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NO.

in the Supreme Court of the United States

JOSEPH C. RUSSELLO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Whether the term "interest" as used in 18 U.S.C. §1963(a)(1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations statute (RICO), does not include income or profits derived from a pattern of racketeering activity?

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Petitioner prays that a Writ of Certiorari be issued to review the En Banc judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case on August 2, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed at ____ F.2d. ____ and is printed in the Appendix.

JURISDICTION

The En Banc judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 2, 1982. The jurisdiction of this court is invoked under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Petitioner was indicted on June 8, 1977, in an 83 page Indictment, along with 21 co-defendants. The Government alleged violations of substantive RICO, 18 U.S.C. §1962(c); RICO conspiracy, 18 U.S.C. 1962(d); and two mail frauds. The RICO conspiracy charge included a prayer of forfeiture of monies received by the petitioner through a course of racketeering.

On February 24, 1978, the jury returned guilty verdicts against petitioner on each of the four charges, as well as a verdict of forfeiture. Judgments of sentence and forfeiture were entered.

On appeal to the Fifth Circuit Court of Appeals, petitioner's convictions were affirmed, but the order of forfeiture was vacated. On Rehearing En Banc, the Court upheld the forfeiture in its decision of August 2, 1982. This Petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

The issue presented upon this Petition for Writ of Certiorari is a purely legal question, the resolution of which need not be considered in light of the facts presented at trial. As stated in the En Banc opinion of the Fifth Circuit Court of appeals, the facts are as follows:

> Briefly, the evidence showed that a group of individuals associated for the purpose of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowners, promoters, investors, and arsonists operated to destroy at least eighteen residential and commercial properties in Tampa and Miami, Florida between July, 1973 and April 1976. The panel summarized the ring's operations as follows:
>
> > At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds.

As pointed out in the En Banc dissenting opinion, Russello was one of the individuals who owned and

insured his building before the advent of the RICO arson ring. He later participated and feloniously burned his property.

Additional facts are set forth in the En Banc opinion of the Fifth Circuit Court of Appeals reproduced in the Appendix.

ARGUMENT

The question presented before this Court, as stated in the En Banc opinion of the Fifth Circuit is, "whether the term 'interest' as used in 18 U.S.C. §1963(a)(1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations statute (RICO) 18 U.S.C. §§1961-1968, includes income or profits derived from a pattern of racketeering activity." This question was answered in the negative by the panel and answered in the affirmative by the En Banc court.

Petitioner would respectfully submit that the ruling of the En Banc Fifth Circuit Court of Appeals that profits are forfeitable is in direct conflict with other cases decided by various District and Circuit Courts. As the Fifth Circuit itself recognized, "Our holding today squarely conflicts with that of the Ninth Circuit in *United States* u *Marubeni America Corporation*, 611 F.2d 673 (9th Cir. 1980)." The En Banc Fifth Circuit opinion also conflicts with *United States vs. Long*, 654 F.2d 911 (3rd Cir. 1981); *United States* u *Meyers*, 432 Fed.Supp. 456 (W.D.Pa. 1977); *United States* u *Rubin*, 559 F.2d 975 (5th Cir. 1977); *United States* u *Thevis*, 474 Fed.Supp. 134 (N.D.Ga. 1979); and *United States* u *Godoy*, 678 F.2d 84 (9th Cir. 1982).

Various theories and reasons have been presented by the courts of this country in finding that "interest" as used in 18 U.S.C. 1963(a)(1) does not include profits. For example, in *United States v. Meyers, supra*, the District Court for the Western District of Pennsylvania recognized that 18 U.S.C. §1963 does not specify a forfeiture of profits. In footnote 18, the Court stated that the continuing criminal enterprise statute, 21 U.S.C. §848(a)(2), which was passed within weeks of the RICO statute, specifically mentions the forfeitability of profits. "By contrast, the terms of 21 U.S.C. §848(a)(2)(A) provide, (with respect to narcotics offenses) for forfeiture of 'the profits obtained . . . in such enterprise.' 21 U.S.C. 848(a)(2)(B) then contains language substantially identical with that involved here." Based upon this failure of the legislature to specify profits in the RICO statute, when they had done so in the C.C.E. statute, the Court reasoned that the legislature did not intend to reach profits, but rather intended to reach ownership and investment interests in the enterprise.

The failure of Congress to specify profits in the RICO forfeiture statute has also been recognized by the Third Circuit in *United States v. Long, supra*. In comparing 18 U.S.C. §1963 with 21 U.S.C. §848, the Court recognized in footnote 6 that:

> While these forfeiture provisions are similar, they are by no means equal in scope; the *in personam* forfeiture of C.C.E. covers all the profits earned from any continuing criminal enterprises. RICO, conversely, requires the defendant to forfeit only his personal interest in the tainted enterprise.

Likewise, this failure to mention income or profits in the RICO forfeiture statute was recognized in *United States v. Marubeni America Corporation, supra:*

> Section 1962(a) makes certain investments of racketeering "income" illegal. When Congress meant "income," . . . it used that term.[7] [7]We note that Congress specifically provided for forfeiture of "profits" obtained from a criminal enterprise in the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U.S.C. §848(a)(2)(A). The Drug Abuse Act was passed by the same Congress in the same month as RICO. Had Congress intended forfeiture of racketeering income, we believe it would have expressly so provided.

In *United States v. Rubin, supra*, the Fifth Circuit was called upon to determine the forfeitability of a union office. The Court recognized that the RICO statute, being a criminal forfeiture statute, was required to be strictly construed. In holding the union office to be forfeitable, the Court recognized the holding of said office to be an interest in the enterprise. To reach this conclusion, the Court held that the forfeiture provisions of 18 U.S.C. §1963 related to the forfeiture of interest "in the enterprise".

> Congress clearly contemplated forfeiture of any ownership or investment type of interest a defendant might hold in an organization he had conducted through a pattern of racketeering activity. It is just such an interest that would not otherwise terminate with incarceration and would enable a defendant and/or his confederates

> to maintain control of an organization . . . . The Senate Judiciary Committee wrote that the language 'is designed to accomplish a forfeiture of any interest of any type in the enterprise' . . . . (Congress) also intended forfeiture fully to serve the broader goal of legally separating persons who run an enterprise through the defined racketeering activity from the enterprise itself.

As noted in *United States v. Thevis, supra*, "Curiously, the term 'interest' is not defined by RICO. But, as employed in 18 U.S.C. §1963(a), it derives its meaning from the activities barred by §1962". Thus, a direct relationship exists between that which is subject to forfeiture under 18 U.S.C. §1963 as a result of racketeering activity and that which constitutes racketeering activity under 18 U.S.C. §1962.

> 18 U.S.C. §1963(a)(1) is directed at an interest acquired or maintained *"in violation of Section 1962."* (emphasis added). The statutory concept on which 18 U.S.C. §1962 rests is the "enterprise" concept; that is to say, it is the acquisition, maintenance, or participation in an enterprise through a pattern of racketeering activity that is proscribed under that section. Since it is the addition of the "enterprise" concept which distinguishes a RICO prosecution under 18 U.S.C. §1962 from an ordinary prosecution directed at each of the individual predicated acts which constitute the pattern of racketeering activity, this Court is convinced that the "interest" subject to forfeiture under 18 U.S.C. §1963(a) is limited to the interest in the

> enterprise, and does not extend to fruits or profits generated from the enterprise.

Unlike the above-cited cases, which attempt to interpret "interest" in light of the express wording of the RICO and related statutes, the Court in *United States v. Marubeni America Corporation, supra*, attempted to analyze the legislative history of the enactment, and to interpret the statute in light thereof. For example, the Court placed much emphasis upon a letter from Deputy Attorney General Richard Kleindienst to the Senate Subcommittee in charge of the Organized Crime Control Act, which specified the scope of the forfeiture statute to be limited to "interest in the enterprise".

> It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom, rather than of Constitutional power.

The En Banc court in the pending case rejected the importance of this letter because it believed it to have been taken out of context. Specifically, the En Banc court reasoned that the Kleindienst letter was a response to Congress's question as to the constitutionality of enacting an *in personam* forfeiture statute, and that any reference to the scope of the forfeiture statute was surplusage. Thus, reasoned the En Banc court, the Kleindienst letter could not be used to establish Congressional intent.

However, the En Banc court totally ignores the stated purpose and scope of the forfeiture statute as expressed in Senate Report No. 91-617: "Section 1963 provides criminal penalties for the violation of Section 1962, above. Subsection (a) provides the remedy of criminal forfeiture . . . . The language *is designed* to accomplish a forfeiture of any "interest" of any type *in the enterprise* acquired by the defendant or in which the defendant has participated in violation of Section 1962." (emphasis added). This purpose is further expressed in House Report No. 91-1549, which states that RICO calls for forfeiture of interests "in an enterprise".

18 U.S.C. §1963(a) provides that:

> Whoever violates any provision of Section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962 and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

The analysis of the En Banc court in the pending case was based upon an attempt to give meaning to each of the sections of 18 U.S.C. §1962 and §1963. The Court reasoned that a limitation of "interest" in 18 U.S.C. §1963(a)(1) ignores forfeiture for violations of 18 U.S.C. §1962(c), enterprises in fact. The En Banc court

further reasoned that an enterprise limitation on 18 U.S.C. §1963(a)(1) would render said section surplusage in light of §1963(a)(2). The petitioner would respectfully submit that due credence may be given to each section of the RICO statute, even with the interests subject to forfeiture being limited to interests in the enterprise as required by statutory wording, statutory interpretation, and legislative history.

As noted above, 18 U.S.C. §1963(a)(1) provides forfeiture for interests acquired or maintained, and 18 U.S.C. §1963(a)(2) provides for forfeiture of interests, etc. "affording a source of influence over any enterprise. . . ." As pointed out in the dissent, §1963(a)(2) limits itself by language and intent to interests in an enterprise over which there is a source of influence in violation of §1962. 18 U.S.C. §1962(a) provides for legitimate business investments of less than one per cent, which do not give the criminal enterprise controlling interest in the business invested. Thus, under 18 U.S.C. §1963(a)(2), a legitimate investment of less than one per cent which does not give controlling interest, although made by a criminal enterprise, would not be forfeitable. This interest, though not declared to be illegal under §1962(a), and not forfeitable under §1963(a)(2), would be forfeitable under §1963(a)(1).

This interpretation was more succinctly stated in *United States v. Thevis, supra:*

> While 18 U.S.C. §§1963(a)(1) and (a)(2) both provide for the forfeiture of an interest in the enterprise, it seems to this Court that §1963(a)(1) is directed toward the forfeiture of a minority

> interest in an enterprise controlled by others. 18 U.S.C. §1963(a)(2), on the other hand, reaches the interest in the enterprise where the defendant is in control, either alone or in conjunction with other defendants.

One of the major reasons for the En Banc court's opinion that 18 U.S.C. §1963(a)(1) reached profits and not interests in the enterprise was the belief that to decide otherwise would relegate violations of 18 U.S.C. §1962(c) exempt from forfeiture.

> The cure for these defects in reasoning lies in examination of the effect of §1963(a)(1) on a §1962(c) violation. Section 1962(c) makes conducting an enterprise through a pattern of racketeering unlawful. The forfeiture resulting therefrom under §1963(a)(1) is the interest (or interests) acquired through or as a result of that unlawful conduct. Forfeiture of defendant's interest in the enterprise is governed by the impact of §1963(a)(1) and (2) upon §1962(a) and (b). If §1962(c) results in any forfeiture at all—and §1963(a) provides for forfeiture if one violates *any* §1962 Section—it must provide for forfeiture of something more than §1962(a) or (b) or be mere surplusage.

It is generally considered that enterprises under 18 U.S.C. §1962(a) and (b) are legally recognized enterprises or companies. 18 U.S.C. §1962(c) relates to both employees of enterprises and companies who do not have investment interests and to what is generally recognized to be enterprises in fact. Thus, a group of individuals who

violate the dictates of the RICO statute may themselves be the illegal enterprise under 18 U.S.C. §1962(c). It was the En Banc court's dilemma in cases of enterprises in fact under 18 U.S.C. §1962(c), that there appears little that is subject to forfeiture other than profits.

This dilemma was not unrecognized by both Congress and the Justice Department when they sought enactment of the RICO statute. As stated in the dissent, "I am cognizant that this conclusion occasions problems with respect to associations in which one cannot own a legal interest, as in the case *sub judice*. This limitation was recognized by the Justice Department in its comments on the legislation when it observed that 'there is often nothing to forfeit . . . in the case of individuals associated in fact'."

This does not mean, however, that there are no interests in the enterprise which may be forfeited in cases involving enterprises in fact, since forfeitable interests do exist. In *United States v. Godoy, supra*, the Court was called upon to recognize an association in fact under 18 U.S.C. §1962(c). Certain monies were made by the criminal enterprise through a pattern of racketeering. These profits were then invested by the enterprise in fact, through the purchase of real estate. The Government sought forfeiture of the real estate under 18 U.S.C. §1963(a)(1) in that said real estate investments were an "interest in any enterprise". Thus, the enterprise in fact did own interests in the enterprise which had been acquired or maintained in violation of §1962, and were as such subject to forfeiture.

The Ninth Circuit in *United States v. Godoy, supra*, and *United States v. Marubeni America Corporation*,

supra, have recognized the relationship between 18 U.S.C. §1962(c) and 18 U.S.C. §1963(a)(1). Profits of an illegal enterprise in fact, which have been distributed to the individual members, are not forfeitable, since they are not an interest in the enterprise. However, monies of the enterprise, which have been invested, and which in fact belong to the enterprise, are interest in the enterprise, and as such are forfeitable.

A brief summary of the various sections of 18 U.S.C. §1962 and 18 U.S.C. §1963 would be as follows: 18 U.S.C. §1962(a) and (b) relate to enterprises in law, while 18 U.S.C. §1962(c) relates to enterprises in fact. 18 U.S.C. §1963(a)(2) provides for the forfeiture of interests obtained by enterprises in law in which either a controlling interest or over one per cent investment has been obtained. 18 U.S.C. §1963(a)(1) provides for the forfeiture of interests obtained by enterprises in law in which neither a controlling interest nor over one per cent investment has been obtained. In addition, 18 U.S.C. §1963(a)(1) provides for the forfeiture of interests in the enterprise obtained by enterprises in fact, such as real estate and other investments. 18 U.S.C. §1963(a)(1), being limited to interests in the enterprise and to individual members' interest in said enterprise, does not extend to profits or dividends which have been distributed and over which the enterprise has no control. This interpretation, being consistent with statutory wording and legislative history, gives meaning to each statutory subsection; no portions of the RICO statute are rendered mere surplusage.

Petitioner would respectfully submit that the conclusion that 18 U.S.C. §1962(a)(1) is limited to interests

in the enterprise is supported by the fact that every section of the RICO statute refers to interests in the enterprise, that Congress specified the forfeiture of income and profits when it desired to do so in the companion C.C.E. statute, and that the Senate and House Reports expressly announced this legislative intent. More importantly, it is only by the analysis rendered above that *every* section of 18 U.S.C. §1962 and §1963 is given meaning.

The opinion of the En Banc court that 18 U.S.C. §1963(a)(1) applies to any interest, whether in the enterprise or not, would render §1963(a)(2) surplusage. An interest affording a source of influence over an enterprise as specified in §1963(a)(2) is by definition an interest under the En Banc court's interpretation of §1963(a)(1). Using the Court's own analysis, what is the purpose of §1963(a)(2), if it is in effect a lesser included of §1963(a)(1)?

As recognized by the En Banc court, the opinion below directly conflicts with *United States v. Marubeni America Corporation, supra.* Petitioner would respectfully submit that the opinion below also directly conflicts with *United States v. Long, supra; United States v. Meyers, supra; United States v. Rubin, supra; United States v. Thevis, supra;* and *United States v. Godoy, supra.* **This Court should accept jurisdiction to resolve the conflict.**

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Sam C. MARTINO, Joseph C. Russello
and Rolando Gonzalez Rodriguez,
Defendants-Appellants.

No. 78-3611.

United States Court of Appeals,
Fifth Circuit.*

Aug. 2, 1982.

Appeal was taken from a judgment of the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., directing the forfeiture of moneys received by defendants as insurance payments in an insurance fraud scheme. In a panel opinion, the Court of Appeals, Politz, Circuit Judge, 648 F.2d 367, certiorari denied, ____ U.S. ____, 102 S.Ct. 2020, 72 L.Ed.2d 474, reversed. Rehearing en banc was granted. The Court of Appeals, James C. Hill, Circuit Judge, held that insurance proceeds obtained through conduct of arson ring were subject to forfeiture under criminal forfeiture provisions of racketeer influenced and corrupt organizations statute.

Affirmed; remanded.

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*Former Fifth Circuit case, section 9(1) of Public Law 96-452, October 14, 1980.

Politz, Circuit Judge, dissented and filed opinion in which Alvin B. Rubin, Tate, Thomas A. Clark, Jerre S. Williams, and Garwood, Circuit Judges, joined.

1. Statutes —188

In absence of clearly expressed legislative intention to contrary, plain language of statute controls its construction.

2. Forfeitures —3

Term "interest" as used in criminal forfeiture provision of racketeer influenced and corrupt organizations statute includes income or profit derived from pattern of racketeering activity and is not limited to interests in enterprise. 18 U.S.C.A. §§1961-1968, 1963(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

3. Forfeitures —3

Insurance proceeds obtained through conduct of arson ring were subject to forfeiture under criminal forfeiture provisions of racketeer influenced and corrupt organizations statute. 18 U.S.C.A. §§1961-1968, 1963(a)(1).

D. Frank Winkles, Tampa, Fla., for Martino.

Raymond E. LaPorte, Tampa, Fla., for Russello.

Peter N. Macaluso, Tampa, Fla., for Rodriguez.

Eleanor J. Hill, Sp. Atty., Dept. of Justice, Tampa, Fla., Sara Criscitelli, Dept. of Justice, Washington, D.C., for the U.S.

William W. Taylor, III, Washington, D.C., for amicus curiae.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges.**

JAMES C. HILL, Circuit Judge:

We granted rehearing en banc in this case to decide whether the term "interest" as used in 18 U.S.C. §1963(a)(1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations statute (RICO), 18 U.S.C. §§1961-1968,[1] includes income or profits derived from a pattern of racketeering activity. Specifically

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**Judge Reynaldo G. Garza was a member of the en banc court under 28 U.S.C.A. 46(c) and participated in the oral argument of the case en banc. Subsequently, the Omnibus Judgeship Bill, Public Law 95-486 (95th Congress) was approved October 20, 1978. In view of this, Judge Garza does not participate in this decision.

[1]RICO constitutes Title IX of the Organized Crime Control Act of 1970, Pub.L.No.91-452, 84 Stat. 941 (1970).

at issue in this case is the forfeitability of insurance proceeds obtained through the conduct of an arson ring. The district court resolved this question of statutory construction in the government's favor. On appeal a panel of this court reversed the monetary forfeiture orders.[2] We now affirm the decision reached by the trial court.

I

The facts surrounding the indictment, prosecution, and conviction of the various defendants are set out in detail in the panel opinion, 648 F.2d at 378-80, 409-11 app. Briefly, the evidence showed that a group of individuals associated for the purpose of committing arson with the intent to defraud insurance companies. This association in fact enterprise,[3] composed of an insurance adjuster, homeowners, promoters, investors, and arsonists, operated to destroy at least eighteen residential and commercial properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows:

> At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner

[2] *United States v. Martino*, 648 F.2d 367, 407-09 (5th Cir. 1981), *vacated in part on other grounds sub nom. United States v. Holt*, 650 F.2d 651 (5th Cir. 1981) (conviction of defendant Holt mooted by his death). The panel's discussion of the forfeiture issue was not printed in the federal reporter due to our grant of rehearing en banc. That section appears in full in the advance sheets, slip op. at 8274-76 (5th Cir. June 19, 1981).

[3] 18 U.S.C. §1961(4) (1976).

> filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds.

Id. at 380. These activities formed the basis for an indictment charging twenty-three defendants with mail fraud,[4] conspiring to violate RICO,[5] and substantive RICO violations.[6] Following a jury trial sixteen defendants were found guilty and sentenced to varying terms of imprisonment.[7] Pursuant to Federal Rule of Criminal Procedure 31(e),[8] the forfeiture question was then submitted to the jury for its special verdict on the extent of the interest or property subject to forfeiture. The jury ordered four defendants to forfeit monies received as insurance payments upon the successful burning of their properties: Paul Guarino—$4,000.00;

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[4]18 U.S.C. §1341 (1976).

[5]18 U.S.C. §1962(d) (1976).

[6]18 U.S.C. §1962(c) (1976).

[7]648 F.2d at 379 n.1.

[8]That rule provides: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."

Sam C. Martino—$2,500.00;[9] Rolando G. Rodriguez—$4,266.83; and Joseph C. Russello—$340,043.69. Concluding that §1963(a)(1) was intended to reach only interests in an enterprise and not the profits or income from racketeering activity, the panel reversed these monetary forfeitures. 648 F.2d at 409.[10]

II

A

[1] Resolution of this issue of statutory construction must begin with an analysis of the language of the statute itself. *Bread Political Action Committee v. Federal Election Commission*, ___ U.S. ___, ___, 102 S.Ct. 1235, 1237, 71 L.Ed.2d 432 (1982) (quoting *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187, 100 S.Ct. 2601, 2608, 65 L.Ed.2d 696 (1980)). In the absence of "a clearly expressed legislative intention to the contrary," the plain language of the statute controls its construction. ___ U.S. ___, 102 S.Ct. at 1238 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)). Under 18 U.S.C. §1963(a), a defendant who

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[9]Defendant Martino was also ordered to forfeit his ownership interests in two companies, Ybor Loan Company and M & S Investment Corporation. Both of these companies provided funds for the arson and fraud schemes. The panel affirmed the forfeiture of these interests, 648 F.2d at 409. The propriety of this aspect of the forfeiture order has not been questioned on this rehearing.

[10]This reversal did not affect the forfeiture order against defendant Guarino, as he did not file a notice of appeal from that order. 648 F.2d at 407 n.19.

> violates any provision of section 1962 . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interests in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

On its face, §1963(a)(1) does not limit forfeitable interests to those in an enterprise. Rather, the statute speaks broadly of "*any* interest" which is the product of violating RICO's prohibitory provision, section 1962. Significantly, §1963(a)(2) expressly limits forfeitable interests to those in an enterprise. Guiding our efforts at statutory construction in the past has been the presumption that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).[11] Hence the limitation in §1963(a)(2), and the absence of limitation in §1963(a)(1), confirm what the straightforward language of the latter already tells us: that §1963(a)(1) reaches *any* interest derived from a violation of §1962.

[2, 3] No definition of the term "interest" appears in RICO. We must assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct.

[11] As we shall note *infra*, that presumption is fully borne out in this case by the revisions made to §1963(a) before it assumed the form in which it was enacted.

585, 7 L.Ed.2d 492 (1962). The common or dictionary definition of the term includes "right, title, or legal share in something; participation in advantage, profit, and responsibility." Webster's Third New International Dictionary 1178 (1971). It has also been defined as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something." Black's Law Dictionary 729 (5th ed. 1979). The concept is therefore broad enough to include profits or income. Indeed, this understanding comports with the House Report's definition of "interest" as inclusive of "all property and interests, as broadly described, which are related to the violations." H.R.Rep.No.1549, 91st Cong., 2d Sess. 57, *reprinted in* [1970] U.S.Code Cong. & Ad.News 4007.

Not only is the concept of profits or proceeds within the plain meaning of "interest," but the proceeds in question in this case were "acquired . . . in violation of section 1962," as §1963(a)(1) requires. The insurance proceeds were the product of the defendants' violation of §1962(c). That section makes it unlawful for "any person . . . associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." In this case, members of the arson ring conducted the affairs of that enterprise through the racketeering offenses of arson and mail fraud. Thus the unambiguous language of §1963(a)(1) supports the view that profits derived from a pattern of racketeering activities are subject to forfeiture.

Defendants and amicus[12] maintain that their position —that forfeitable interests under §1963(a)(1) are limited

[12]The National Association of Criminal Defense Lawyers, Inc. was permitted to participate as amicus curiae on rehearing.

to interests in an enterprise—also is supported by the language of the statute. Their analysis of the statute cannot withstand scrutiny. The only express limitation on forfeitable interests imposed by the language of the statute itself is that the interest must be "acquired or maintained in violation of section 1962." Defendants and amicus, however, read a further limitation into this language. Specifically they argue that "one acquires or maintains an interest in violation of Section 1962 *only* when he acquires or maintains an interest *in contravention of Sections 1962(a) or (b).*" Brief for Amicus Curiae at 7 (emphasis added). Briefly, §1962(a) proscribes the use or investment of illegally derived income to acquire, establish, or operate an enterprise, while §1962(b) prohibits the use of racketeering methods to acquire or maintain an interest in an enterprise.[13] Accordingly, the defendants and amicus argue, the link between the prohibitory provisions in §§1962(a) and (b), which refer to acquiring

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[13]In pertinent part these sections provide:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. §§1962(a), (b) (1976).

or maintaining violations, and the penal provision in §1963(a)(1), which refers to interests "acquired or maintained" in violation of RICO, is clear. This reasoning, however, is flawed in several respects. First, it completely ignores §1962(c). The language of §1963(a)(1) ties forfeiture to violation of *any* of the prohibitory provisions in §1962, not just §§1962(a) and (b).[14]

Second, the argument of defendants and amicus misconstrues the function of the reference in §1963(a)(1) to §1962. To be sure, the reference serves a kind of limiting function, but that function is not to define the type of forfeitable interests, as defendants and amicus assume. Rather, the reference merely identifies the illegal activities which trigger the forfeiture penalty, supplying the nexus between the RICO violation and the forfeitable property which the government must establish at trial.[15]

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[14]The district court in *United States v. Thevis*, 474 F.Supp. 134 (N.D.Ga. 1979), fell into this same error in concluding that §1963(a)(1) does not reach proceeds derived from a violation of §1962(c).

[15]Again, this second error also infected the district court's reasoning in *Thevis*. That court opined:

> Since it is the addition of the "enterprise" concept which distinguishes a RICO prosecution under 18 U.S.C. §1962 from an ordinary prosecution directed at each of the individual predicated [sic] acts which constitute the pattern of racketeering activity, this Court is convinced that the "interest" subject to forfeiture under 18 U.S.C. §1963(a) is limited to the interest in the enterprise and does not extend to fruits or profits generated from the enterprise.

Thevis, 474 F. Supp. at 142. That the enterprise concept is the overriding concept in RICO, distinguishing a RICO *prosecution*

Third, reading an enterprise limitation into §1963(a)(1) renders that section surplusage. Section 1963(a)(2) on its face requires forfeiture of "any interest in . . . any enterprise which [the defendant] has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." The establishment, operation, and control language clearly refers to violations of §§1962(a) and (b). Section 1963(a)(1) would merely be duplicative of this provision if, as defendants contend, it reaches only interests in an enterprise acquired or maintained in violation of §§1962(a) and (b).

The cure for these defects in reasoning lies in an examination of the effect of §1963(a)(1) on a §1962(c) violation. Section 1962(c) makes conducting an enterprise through a pattern of racketeering unlawful. The forfeiture resulting therefrom, under §1963(a)(1), is the interest (or interests) acquired through or as a result of that unlawful conduct. Forfeiture of defendant's interest *in* the enterprise is governed by the impact of §1963(a)(1) and (2) upon §1962(a) and (b). If §1962(c) results in any forfeiture at all—and §1963(a) provides for forfeiture if one violates *any* §1962 section—it must provide for forfeiture of something more than §1962(a) or (b) or be mere surplusage. This interpretation restores §1963(a)(1) to a role in the penalty scheme different from that played by §1963(a)(2) and accords with the unambiguous language of the former section.

(Footnote 15 Continued)

from an ordinary prosecution for the predicate acts of racketeering, does not necessarily mean that the enterprise concept is also a limitation on the type of property interests subject to forfeiture under §1963(a)(1).

B

Turning now from the language of the statute itself to expressions of legislative intent, we find confirmation for our view that §1963(a)(1) reaches profits derived from racketeering activity.[16] In its Statement of Findings and Purpose prefatory to the Organized Crime Control Act of 1970, Congress spoke of the problem it sought to resolve in the following words:

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime *derives a major portion of its power through money obtained from such*

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[16]The government directs our attention to RICO's liberal construction clause, arguing that it provides a definitive guide to the proper interpretation of §1963(a)(1). In that clause Congress has mandated that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970. Pub.L.No.91-452, §904(a), 84 Stat. 947 (1970). In response the defendants and amicus contend that following this congressional directive would violate the rule of lenity, which calls for strict construction of penal provisions. We need not resolve the suggested conflict because we find no ambiguity in the statute which would occasion the invocation of either of these interpretive aids. The rule of lenity "only serves as an aid for resolving an ambiguity." *Callanan v. United States*, 364 U.S. 587, 596, 81 S.Ct. 321, 326, 5 L.Ed.2d 312 (1961); see *McElroy v. United States*, ___ U.S. ___, ___, 102 S.Ct. 1332, 1341, 71 L.Ed.2d 522 (1982). As we discussed above, the language of §1963(a)(1) is plain, and as we shall note *infra*, the legislative history is equally clear in revealing the broad scope which Congress intended §1963(a) to have.

> *illegal endeavors* as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . .

Organized Crime Control Act of 1970, Pub. L.No.91-452, 84 Stat. 922-23 (1970) (emphasis added). Having identified the problem, Congress also determined the cause for the criminal justice system's failure to make inroads on organized crime and its economic power base and proposed the cure it envisioned the new Act to embody.

> [S]anctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing *new penal prohibitions*, and by providing *enhanced sanctions and new remedies* to deal with the unlawful activities of those engaged in organized crime.

Id. at 923 (emphasis added). The Senate Committee Report on the bill reiterated this philosophy.

> What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well being of the Nation. In short, an attack must be made on *their source of economic power itself*, and the attack must take place on all available fronts.

S.Rep.No.617, 91st Cong., 1st Sess. 79 (1969) (emphasis added). Simply put, Congress' express objective in RICO is to take the profit out of organized crime.[17]

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[17]The legislative history is replete with references to this broad "hit them where they hurt" philosophy. Senator McClellan, chief sponsor of the Act, voiced the urgency of the need for new penal remedies to divest organized crime of the "ill-gotten gains [amassed by] criminals where they enter or operate an organization through a pattern of racketeering activity." 116 Cong.Rec. 592 (1970) (remarks of Sen. McClellan). Senator McClellan further commented: "Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, *forfeiture of their ill-gotten gains.*" 116 Cong.Rec. 591 (1970) (remarks of Sen. McClellan) (emphasis added). Representative Poff, a manager of the bill in the House, viewed the criminal forfeiture provision as more than a penalty. "After conviction, the ill-gotten gains must be forfeited to the Government. This sanction is not only poetic justice but a strong deterrent as well." 115 Cong.Rec. 9951 (1969). Senator Byrd, a member of the Senate Judiciary Committee, also spoke of the deterrence effected by the broad forfeiture sanctions: "By removing its leaders from positions of ownership, by preventing them and their associates from regaining control, *and by visiting*

The criminal forfeiture provisions of §1963(a) are central to this remedial objective. Section 1963(a) launches a two-pronged attack on the sources of economic power which feed the coffers and activities of organized crime. It demands both divestiture of power over the enterprise itself[18] and seizure of the income derived from racketeering activities.

From the debates on the Organized Crime Control Act, it is clear that the target of Congress' attack included racketeering operations in which the chief type of property interest obtained by organized crime would be something other than an ownership or proprietary interest.[19] For example, the legislative history

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(Footnote 17 Continued)

heavy economic sanctions on their predatory business practices this legislation should prove to be a mighty deterrent to any further expansion of organized crime's economic power." 116 Cong.Rec. 607 (1970) (remarks of Sen. Byrd) (emphasis added).

This court has also recognized that the purpose of the forfeiture provision is to "deprive those convicted of racketeering activity of their economic base so that they could not easily continue illegal activities." *United States v. L'Hoste*, 609 F.2d 796, 814 (5th Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980).

[18]We note that interests in an enterprise may take varying forms since they encompass both ownershp interests (e.g., stock ownership or real property interests) and interests affording a source of influence over or control of the enterprise. *See, e.g., United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded on other grounds*, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978) (forfeiture of union office).

[19]To be sure, Congress principally viewed RICO as a response to organized crime's infiltration into legitimate businesses. *United States v. Turkette*, 452 U.S. 576, 591, 101 S.Ct. 2524, 2533, 69

refers to instances in which organized crime members infiltrate legitimate businesses, "bleed" these companies through fraud or theft, and thus force them into bankruptcy.[20] Organized crime was also linked to credit card and bad check frauds, 116 Cong.Rec. 970 (1970) (remarks of Sen. Bible), and to theft from welfare and pension funds, 115 Cong.Rec. 5874 (1969) (remarks of Sen. McClellan). The Senate Report cited examples of arson schemes, particularly in the context of liquidating defaulted loan shark debts by burning the debtor's property and collecting the insurance proceeds. S.Rep.No.617, 91st Cong., 1st Sess. 77 (1969). *See also* 115 Cong.Rec. 5873 (1969) (remarks of Sen. McClellan). Narcotics trafficking, loan sharking, insurance fraud, extortion, gambling, and prostitution—all crimes in

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(Footnote 19 Continued)

L.Ed.2d 246 (1981). Accordingly, it contemplated the forfeiture primarily of ownership or controlling interests in such businesses. This does not mean, however, that we should blind ourselves to other forms of racketeering which Congress also declared to be the object of its concern and should embrace the circumscribed approach advanced by defendants and amicus.

[20]Senator Hruska documented one instance in which an organized crime figure became president of a company, bought large quantities of supplies on credit, ran up debts of approximately $1.3 million, made quick cut-rate sales, and pocketed about $750,000 of company funds for personal use. 115 Cong.Rec. 23569 (1969) (remarks of Sen. Hruska). Senator McClellan noted that "[a]pproximately 200 syndicate-inspired bankruptcy schemes are perpetrated annually." 116 Cong.Rec. 18940 (1970) (remarks of Sen. McClellan).

which the proceeds primarily consist of money—were all objects of congressional concern.[21]

In addition, when as here the RICO enterprise is an association in fact, rather than a legal entity, and the alleged RICO violation is conducting the affairs of this enterprise through racketeering methods, there often may be no forfeitable property other than the ill-gotten proceeds. Such may be the case not only with arson-for-profit rings but also with narcotics trafficking or pornography operations. It would certainly be contrary to Congress' stated intention to attack organized crime's source of economic power "on all available fronts," S.Rep.No.617, 91st Cong., 1st Sess. 79 (1969), to insulate from forfeiture the sole product of many racketeering activities. Excluding proceeds from the reach of §1963(a)(1) would provide an incentive, not a deterrent, to bankruptcy schemes and to other forms of racketeering which yield primarily cash revenues.

Still further support for a broad interpretation of §1963(a)(1) is found in the legislative history.[22] An early

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[21] *See, e.g.*, 115 Cong.Rec. 5873, 5874, 5884-85 (1969) (remarks of Sen. McClellan); 116 Cong.Rec. 585, 586 (1970) (remarks of Sen. McClellan); 601 (remarks of Sen. Hruska); 606 (remarks of Sen. Byrd); 953 (remarks of Sen. Thurmond); 962 (remarks of Sen. Murphy); 970 (remarks of Sen. Bible); 35199 (remarks of Rep. St. Germain); 35300 (remarks of Rep. Mayne). *See also* 18 U.S.C. §1961(1) (Supp. IV 1980) (list of predicate acts of racketeering activity which may form basis of RICO prosecution).

[22] We are mindful that the language of the statute, and not the legislative history, is the law of the land. Indeed "the language of the statute [is] the most reliable evidence of its intent . . . ." *United States v. Turkette*, 452 U.S. 576, 593, 101 S.Ct. 2524, 2533, 69 L.Ed.2d 246 (1981). With that caveat we proceed.

draft of RICO, S. 1861, which was introduced on April 18, 1969, contained only one basic forfeiture provision and did expressly limit forfeitable property to interests in an enterprise. It read in full:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $10,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States all interest *in the enterprise* engaged in, or the activities of which affect, interstate or foreign commerce.

S. 1861, 91st Cong., 1st Sess. (1969). In mid-October, however, the Senate Judiciary Committee began a revision of RICO. Out of the revision developed a section 1963(a) containing two subparts. Section 1963(a)(2) retained the concept of limiting forfeiture to a defendant's interest in an enterprise. On the other hand, section 1963(a)(1) dropped the enterprise limitation altogether. We find it persuasive that Congress considered limiting all forfeitures under RICO to enterprise interests but, after extensive legislative work, ultimately opted to delete this across-the-board restriction.

Finally, in examining the legislative history we must address one of the chief reasons cited by the panel for its conclusion that §1963(a)(1) does not reach the insurance proceeds at issue here. In August 1969 Congress received a letter from then Deputy Attorney General Richard P. Kleindienst commenting upon RICO's forfeiture provision. It expressed the views of the Justice Department as follows:

> It is felt that this revival of the concept of forfeiture as a criminal penalty, *limited as it is in Section 1963(a) to one's interest in the enterprise* which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender is a matter of Congressional wisdom rather than of constitutional power . . . .

Measures Relating to Organized Crime, Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 407 (1969) (emphasis added). The panel viewed the letter as indicative of congressional intent strictly to limit forfeitures. This interpretation of the letter's significance, however, ignores its context.

First, Congress was aware that it was entering new territory with the enactment of RICO; there was concern particularly over the constitutionality of the sanction of the personam criminal forfeiture.[23] The Kleindienst letter addresses that concern, explaining that constitutional problems are avoided by the requirement of a nexus between a §1962 violation and

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[23]Reacting against the harsh English tradition of criminal forfeiture, the framers of the Constitution provided:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. Const. art. III, §3, cl. 2. The first Congress also enacted a provision barring corruption of the blood or forfeiture of estate upon conviction. Act of Apr. 30, 1790, I Stat. 117, ch. 9 §24 (codified in 18 USC. §3563).

the interest to be forfeited. Furthermore, the letter was submitted as a commentary on S. 1961, the original draft of RICO, which as we have noted above, contained a unitary forfeiture provision with an express enterprise limitation. While the Senate Report on S. 30, the bill ultimately enacted, does cite Kleindienst's letter, [24] nothing in the report suggests that the letter provides a technical commentary on the scope of each section of the expanded bill.

Our more limited interpretation of the meaning of the Kleindienst letter finds support in the Justice Department's comments in subsequent House hearings on S. 30 as it passed the Senate.

> [Title IX] contains a provision for the forfeiture of any interest which has been attained in violation of the criminal provisions of the statute. The Department of Justice commented at length *upon the constitutionality of this sanction* in a report on S. 1861, from which Title IX has been derived, in [the Kleindienst letter] . . . .

Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 171 (1970) (emphasis added). Notably, the Justice Department's comments on S. 30 do not described §1963(a) forfeitures as limited to interests in an enterprise.

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[24] S.Rep.No.617, 91st Cong., 1st Sess. 79 (1969).

III

Our holding today squarely conflicts with that of the Ninth Circuit in *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980).[25] *But see United States v. Godoy*, 678 F.2d 84 (9th Cir. 1982) (holding that commercial real estate purchased with profits derived from racketeering activity is subject to forfeiture). For several reasons, some of which we have already discussed,[26] we find the *Marubeni* rationale unconvincing.

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[25]In *Marubeni* two corporations and several individuals were charged with mail fraud, wire fraud, interstate travel to commit bribery, and conspiracy to commit these offenses. These acts were committed as part of a scheme to rig the competitive bidding for contracts to supply telephone cable. The government appealed from the district court's dismissal of that portion of the indictment seeking forfeiture of the over $8.8 million in profit on the telephone cable contracts. These profits were alleged to be the product of the defendants' conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S. §1962(c), *United States v. Marubeni America Corp.*, 611 F.2d 763, 764 (9th Cir. 1980).

[26]Among the reasons compelling the Ninth Circuit's decision were the linguistic relationship between §1963(a)(1) and §§1962(a) and (b) and the Justice Department views as expressed in the Kleindienst letter. 611 F.2d at 766, 768. For a thorough critical analysis of the entire opinion *see* Trojanowski, *RICO Forfeiture: Tracing and Procedure; Appendix: United States v. Marubeni America Corp. and the Scope of RICO Forfeiture*, in 1 Techniques in the Investigation and Prosecution of Organized Crime 378a (G. Blakey ed. 1980), and Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?*, 55 Notre Dame Law. 777, 783-89 (1980).

In *Marubeni* the Ninth Circuit focused much of its attention on the "1% investment exception" in §1962(a). *Id.* at 766-67. To the general prohibition in §1962(a) on investment of income derived from a pattern of racketeering activity Congress added an exception.

> A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. §1962(a) (1976). From this the Ninth Circuit reasoned: "Congress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used." 611 F.2d at 767. Our interpretation of §1963(a)(1) does not, as the Ninth Circuit's comment would imply, render §1962(a)'s 1% investment exception meaningless. We believe that the court in *Marubeni* obscured the separate functions of the prohibitory and penalty provisions of RICO.

The 1% investment exception evidences Congress' choice *not to criminalize* the investment of illegally

derived income when the total investment is *de minimis* and thus would not grant the racketeer control over the business entity. So understood the exception functions as a practical limit, exempting from prosecution what otherwise would constitute illegal activity under §1962(a). If the investment of illegally derived income constitutes less than 1% of the issuer's outstanding shares, that investment alone violates no criminal proscription and hence triggers no forfeiture at all. The exception thus limits the definition of what is illegal. It does not immunize from forfeiture the fruits of activities that are made illegal under other provisions of §1962; it "does not create a class of investment of illicit income exempt from forfeiture."[27]

The court in *Marubeni* also points to the use of the term "profits" in the forfeiture provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §848(a)(2)(A),[28] as evidence that Congress would have expressed itself more clearly in §1963(a)(1) if it had intended forfeiture of racketeering income. 611 F.2d at 766 n.7. As we observed above, the concept of "interest" is broad and encompasses the notion of profits. Moreover, Congress' use of differing language for the two forfeiture provisions, with the more comprehensive term employed in RICO, is a logical byproduct of the different evils addressed by the two acts. Under attack in the Comprehensive Drug Abuse

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[27] *Trojanowski, supra* note 26, at 378aa.

[28] The statute provides: "Any person who is convicted . . . of engaging in a continuing criminal enterprise shall forfeit to the United States—(A) the profits obtained by him in such enterprise . . . ." 21 U.S.C. §848(a)(2)(A) (1976).

Prevention and Control Act of 1970 is the narcotics trafficking industry in which organized crime is engaged. The continued dealing in illegal drugs which is proscribed by that Act typically involves cash transactions. By contrast, the interests acquired by violating RICO may take a variety of forms since many types of activity, primarily economic crimes, come within the scope of its prohibitions. *See* 18 U.S.C. §1961(1) (Supp. IV. 1980) (definition of "racketeering activity"). Hence Congress' use of "profits" in 21 U.S.C. §848(a)(2)(A) cannot support the negative inference in the court in *Marubeni* perceived it to have as to the meaning of "interest" in 18 U.S.C. §1963(a)(1).

IV

At oral argument a question was raised as to whether the government has an obligation to trace and identify the current form of monetary proceeds before it may collect on a forfeiture order. Clearly this issue goes to collectibility and related procedures and not to the type of interests forfeitable under §1963(a)(1). The parties did not brief this issue, and we do not resolve it today. Under 18 U.S.C. §1963(c)[29] and Federal Rule of Criminal Procedure 32(b)(2),[30] the district court must determine

[29]In relevant part the statute directs: "Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeitable under this section upon such terms and conditions as the court shall deem proper." 18 U.S.C. §1963(c) (1976).

[30]"When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper." Fed.R.Crim.P 32(b)(2).

the terms and conditions under which the defendants must comply with the monetary forfeitures declared in the special jury verdict and affirmed by our holding today. Because on remand the district judge must undertake this task, we make a few observations on the nature of the questions with which he must grapple. Focusing on the *in personam* character of RICO criminal forfeiture, the government contends in a supplemental letter to this court that it has no obligation whatever at this point[31] to trace the insurance proceeds into their current form. According to the government, the monetary forfeiture order is like any other money judgment, permitting it to satisfy the judgment from any of the defendants' current assets.[32] Commentators, on the other hand, have suggested that normal principles of restitution, particularly the theories of constructive trust and equitable lien, should be applied to trace forfeitable

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[31]Questions regarding the specificity required in the indictment in order to comply with Federal Rule of Criminal Procedure 7(c)(2) and the extent to which tracing principles apply in satisfying that requirement are not before us.

[32]The government points out that its practice in prosecutions under the Comprehensive Drug Abuse Prevention and Control Act of 1970 is to trace the flow of profits and the property later acquired by the profits and to identify the final form of the profits in the indictment. That practice, the government advises, is compelled by the practical inability otherwise to identify the forfeitable sum involved in large drug transactions. The government submits, however, that such tracing is neither statutorily nor constitutionally required. It further points out that, because the amount of the insurance proceeds at issue here is readily identifiable, the inability to otherwise arrive at the forfeitable sum does not compel resort to tracing in this case.

property that has changed form.[33] We intimate no views on the question, leaving it for the district court to determine in the first instance if the issue be raised there.[34]

V

RICO is a powerful and flexible weapon designed to break the economic power of organized crime and hence to undermine its ability to disrupt and drain the national economy. We acknowledge that its breadth supplies a potential for great abuse. The harshness of the statute's impact, however, cannot dictate the proper construction of its provisions. Congress was aware of the far-reaching measures it was enacting to deal with the unprecedented problem of organized crime. The plain language of the statute, its remedial and deterrent purposes, and the legislative history all compel the conclusion that §1963(a)(1) encompasses forfeiture of the income or proceeds of racketeering activity.

The judgment of the district court on the forfeiture issue is

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[33] *Trojanowski, supra* note 26, at 364; Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N.Ill.U.L.Rev. 225, 256 (1981).

[34] The prospect of a priority conflict among competing claimants to the proceeds was also raised at oral argument. We note only that RICO itself directs the Executive to make "due provisions for the rights of innocent persons" in disposing of forfeited property. 18 U.S.C. §1963(c) (1976).

AFFIRMED; REMANDED FOR FURTHER PROCEEDINGS.[35]

POLITZ, Circuit Judge, joined by ALVIN B. RUBIN, VANCE, TATE, THOMAS A. CLARK, JERRE S. WILLIAMS and GARWOOD, Circuit Judges, dissenting:

Respectfully, I dissent, regretting that I cannot join my colleagues in one of the last cases decided en banc by the Former Fifth Circuit. I am unable to concur in the holding that a payment made under a fire insurance policy necessarily constitute a forfeitable "interest" under 18 U.S.C. §1963(a)(1), being of the opinion that the language, structure and purpose of the Racketeer Influenced and Corrupt Organization Act direct a different conclusion.

The issue posited by the court today is whether the term "interest," as used in §1963(a)(1), "includes income or profits derived from a pattern of racketeering activity." That is the larger issue, but perhaps the more precise issue at bar is whether, under the RICO forfeiture provisions, a money judgment may be rendered against a defendant, in a sum equal to the amount paid under a fire insurance policy, for a loss occasioned by arson in a setting violative of RICO.

Just as nature abhors a vacuum, historically our society has abhorred forfeitures. As Judge Hill notes in footnote 23, the framers of the Constitution demonstrated their repudiation of the harsh English tradition of criminal forfeiture, and our very first Congress

[35] With regard to other issues addressed by the panel on appeal, the panel opinion is reinstated.

forbade the forfeiture of an estate because of a criminal conviction. Further, a forfeiture with an *in personam* application, as we have before us, is to be most charily assessed. It is from this perspective that I address the inquiry before the en banc court.

RICO is Title IX of the Organized Crime Control Act of 1970, Congress's solar plexus blow to organized crime. The Act and its legislative history reflect Congress's determination to counter the takeover of legitimate businesses, as well as to combat organized, illegal activities. In enacting RICO, Congress ordained a criminal statute of vast scope and stern consequences, aimed at punishing and deterring those who would wreak havoc in the social and economic fabric of our society.

The penalties to which Congress subjected a violator of RICO, as set forth in §1963, include a fine of up to $25,000, imprisonment of up to 20 years, and the forfeiture to the United States of:

> (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. §1963(a)(1) & (2).

The court today concludes that the word "interest," as here used, includes income or profits derived from a

pattern of racketeering activity. I do not share that conclusion, adhering to the view expressed in the panel opinion that the term "interest," as used in §1963(a)(1), applies only to an interest in the enterprises envisioned in §§1962(a), (b) and (c) and not to income derived from illegal activity. Whether this distinction is wise, prudent or appropriate is, as I perceive it, a matter best left to the legislative branch, for it represents a significant policy decision.

The interests to be forfeited under §1963(a)(1) are those acquired or maintained in violation of §1962. Section 1962(a) prohibits acquiring, establishing or operating "an enterprise" with income derived "from a pattern of racketeering activity or though collection of an unlawful debt." The exception contained in this section sharply focuses the pith of the entire section—money oozing from a pattern of racketeering activity, or resulting from collection of an unlawful debt, may not be used to infiltrate legitimate businesses unless the investment is made under certain limiting circumstances and constitutes less than 1% of the business's outstanding securities. This section prohibits the investment of tainted funds in a legitimate enterprise. Congress determined to place the protective mantle of the federal criminal law around legitimate businesses, guarding them from the corruption inherent in soiled funds. Section 1962(b) procribes the acquiring or maintaining of an interest in or control of an enterprise through racketeering activity or by collection of an unlawful debt. Subsection (c) proscribes the conduct of the affairs of an enterprise through racketeering activity or unlawful debt collection. Recently, the Supreme Court made clear that subsections (b) and (c) apply to both legitimate

and illegitimate associations. *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

I am persuaded that the forfeiture sanction intended by §1963(a)(1) relates to interests in a business acquired with tainted money (§1962(a)), and interests in any enterprise acquired or maintained by racketeering activity or unlawful debt collection, (§1962(b)). I am further persuaded that §1963(a)(2) relates primarily to an interest in an enterprise which is involved in conduct violative of §1962(c). To me, the text of these sections clearly reflects that Congress made interests in enterprises the grist of forfeiture. The sections seek to prevent the use of ill-gotten gains to corrupt businesses, to prevent the acquiring and maintaining of an interest in an enterprise through illegal activities, and to prevent the involvement of enterprises in illegal activities.

There are other reasons to believe that Congress did not intend "income" to be synonymous with "interest" for the purposes of forfeiture under §1963. Although the definitional section, §1961, does not include the specific meaning to be ascribed to "interest" or "income," the term "any interest" and the word "interest" appear in several places throughout the statute. Section 1961(3) refers to a "legal or beneficial interest in property." Section 1962(a) refers to "any interest in . . . any enterprise." Section 1962(b) repeats the words "any interest in . . . any enterprise." Further, §1964(a), the civil remedies section, prescribes that the court may order a person "to divest himself of any interest, direct or indirect, in any enterprise." In each instance the meaning is clear—an "interest" is an interest *in an enterprise*.

The panel found persuasive the analysis of our colleagues of the Ninth Circuit in *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980), who concluded that the forfeiture in RICO extends only to interests in an enterprise and does not include income or proceeds from a pattern of racketeering activity. I continue to be of that view and also find persuasive the discussion in *United States v. Thevis*, 474 F.Supp. 134 (N.D.Ga. 1979) and *United States v. Meyers*, 432 F.Supp. 456 (S.D.Pa. 1977).

The majority concludes that "reading an enterprise limitation into §1963(a)(1) renders that section surplusage." I disagree. One example underscores the error in this suggestion. Hypothesize that an individual uses income from racketeering activity to purchase 2% of the stock of a corporation listed on the stock exchange. The investment is totally passive; no element of control or influence envisioned by §1963(a)(2) is involved. This interest would not be forfeitable under §1963(a)(2), but it would be forfeitable under §1963(a)(1) since the acquisition violates §1962(a). The recognition of an enterprise limitation in §1963(a)(1) does not, therefore, render that section surplusage.

The court today is not impressed with a portion of the legislative history cited by the panel, specifically the August 1969 letter from Deputy Attorney General Richard P. Kleindienst, in part because the letter specifically addressed another pending RICO proposal, S. 1861. Although acknowledging that the Kleindienst letter is cited in the Senate Report on S. 30, the enacted bill, the opinion maintains that the letter provides little meaningful guidance on the scope of the legislation as finally adopted. I disagree.

Although the Kleindienst letter refers to S. 1861, the Senate Report on S. 30 cites the letter as an accurate interpretation of the forfeiture clause. S.Rep.No.91-617, 91st Cong., 1st Sess., 78-80 (1969). That report, in explaining the forfeiture provision notes:

> Section 1963 provides criminal penalties for the violation of section 1962, above. Subsection (a) provides the remedy of criminal forfeiture. . . . The language is designed to accomplish a forfeiture of any "interest" of any type *in the enterprise* acquired by the defendant or in which the defendant has participated in violation of section 1962.

(Emphasis added.) *Id.* at 160. Accord, *id.* at 34.

We find similar language in the House Report which speaks to forfeiture of interest "in an enterprise." H.R.Rep.No.91-1549, 91st Cong., 1st Sess. 35 and 57 (1970), reprinted in 1970 U.S.Code Cong. & Admin. News, 4007, 4010.

The essence of the forfeiture grounds a further reason for my disagreement with the en banc court's conclusion that §1963 allows for forfeiture of monies received as insurance proceeds. Although general forfeitures are historically disfavored, Congress has frequently used the onus of specific forfeitures in combating illegal activities. *See, e.g.*, 15 U.S.C. §11 (forfeiture of property acquired in violation of anti-trust laws); 15 U.S.C. §1177 (forfeiture of property used in connection with illegal gambling); 16 U.S.C. §§65, 117(d), 128, 171, 256c, 4081 (forfeiture of guns and

other equipment used unlawfully in national parks); 18 U.S.C. §924 (forfeiture of firearms used illegally); 18 U.S.C. §1082 (forfeiture of property used in connection with illegal gambling); 18 U.S.C. §3612 (forfeiture of bribe monies illegally received by public officials); 18 U.S.C. §3615 (forfeiture of property used in connection with liquor violations); 18 U.S.C. §3617(d) (forfeiture of vehicles and aircraft seized for a violation of liquor laws); 18 U.S.C. §§3618 & 3619 (forfeiture of conveyances used to introduce intoxicants into Indian territories); 19 U.S.C. §1306 (forfeiture of unwholesome imported meat); 19 U.S.C. §§1453 & 1492 (forfeiture of property seized in violation of customs laws); 21 U.S.C. §334 (forfeiture of adulterated food); 31 U.S.C. §490 (forfeiture of funds illegally withheld by public official); 49 U.S.C. §§781 & 782 (forfeiture of vessels, vehicles and aircraft used to transport contraband). In each of these instances, the forfeiture statutes provided for *in rem* actions against things put to illegal use. Although RICO prescribed an *in personam* forfeiture, it does not provide an unlimited sanction but is, I believe, restricted to the forfeiture of a specific interest in an enterprise which was acquired, or over which the defendant exercised control, contrary to §1962. If Congress had intended otherwise, I am convinced it would have said so clearly and unequivocally.

No strangers to forfeitures generally, Congress is also no stranger to forfeitures of fruits and profits. If Congress meant to impose a forfeiture of income and proceeds in RICO, I suggest Congress could and would have done so in unmistakeable language. Congress knows how to decisively direct the forfeiture of profits. The same Congress which adopted RICO, in a matter of days adopted the Comprehensive Drug Abuse Prevention

and Control Act of 1970. 21 U.S.C. §848(a)(2) states: "Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—(A) *the profits* obtained by him in such enterprise. . . ." (emphasis added). That is the kind of specification one would expect Congress to use when creating our first *in personam* forfeiture statute.

The court today would distinguish this variance in Congressional approach by observing that narcotics trafficking typically involves cash transactions while RICO violations result in interests which take a variety of forms. I disagree with so light a rejection of what I see as a meaningful, instructive variant.

Based on the foregoing, I am of the view that Congress did not intend to include in the §1963(a)(1) forfeiture provision, fire insurance proceeds or other fruits and profits obtained from RICO proscribed activities, other than those which are manifested as interests in one of the enterprises described in §1962. I am cognizant that this conclusion occasions problems with respect to associations in which one cannot own a legal interest, as in the case *sub judice*. This limitation was recognized by the Justice Department in its comments on the legislation, when it observed that "there is often nothing to forfeit . . . in the case of individuals associated in fact." *Forfeiture under 18 U.S.C. §1963—RICO's Most Powerful Weapon*, 17 *Am.Crim.L.Rev.* 379, 391 (1980) (*quoting* U.S. Department of Justice, Explanation of the Racketeer Influenced and Corrupt Organization Statute 2 (4th ed.)). Under my analysis, the kind of enterprise necessarily would be critical in the determination of forfeitable interests. That this poses

an enforcement burden or hurdle is, again, a legislative consideration.

Finally, accepting the proposition that insurance proceeds are forfeitable, I question whether the forfeiture sanction is applicable to Russello and Rodriguez. These two defendants owned and insured buildings before the advent of the RICO arson ring. They later participated and feloniously burned their properties. The insurance proceeds may be taken as a different manifestation of a pre-RICO violation asset. If so, are the insurance payments truly income, fruits, revenue or profits of racketeering activities?

Regardless, these proceeds, based on arson and the payments of which were induced by fraud, are very likely to be defeasible. One would expect that under the insurance contract, and controlling state law, the insurer would be entitled to recapture the payments. In that event, what happens to the forfeiture decrees which are non-asset oriented money judgments, collectible from the defendants and their estates? Assuming recapture by the insurer, or diversion of all or a portion to an innocent third party such as a mortgage holder, will the United States still have an enforceable money judgment against the defendant and his estate? Presumably so, and if that presumption is correct, what about the concept of divestiture of ill-gotten gains and the separation of the convicted defendant from the fruits of his illegal labors? Will this matter not in fact resolve into the forfeiture becoming an additional fine? Did Congress really intend to establish a latent fine with a potential for exceeding the maximum statutorily stated fine ten-fold, twenty-fold or one hundred-fold?

I suggest that this type of difficulty is inherent in today's decision and is a direct concomitant of our holding that the forfeitable interest under §1963(a)(1) extends beyond a present, discernible interest in an existing enterprise.

I respectfully dissent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, this ____ day of _____, 1982.

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Office-Supreme Court, U.S.
FILED
FEB 23 1983

No. 82-472

In The

Supreme Court of the United States

October Term, 1982

JOSEPH C. RUSSELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari filed September 9, 1982.
Certiorari granted January 10, 1983.

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DOCKET ENTRIES

Date	Proceedings
1977	
June 8	—Indictment returned (4 counts).
16	—Deft. waived reading of indictment. Arraigned and plead not guilty as to all Counts.
Nov.	
7	—Proceedings on trial before the Hon. Wm. Terrell Hodges.
8	—Jury trial resumed from Nov. 7, 1977.
9	—Jury trial from Nov. 8, 1977.
10	—Jury selection process continued from Nov. 9th.
11	—Trial resumed.
14	—Trial resumed.
15	—Trial resumed.
16	—Jury trial resumed from Nov. 15, 1977.
17	—Trial resumed.
18	—Trial resumed.
21	—Trial resumed.
22	—Jury trial resumed from Nov. 21, 1977.
23	—Jury trial resumed from Nov. 22, 1977.
28	—Jury trial resumed from Nov. 23, 1977.
29	—Jury trial resumed from Nov. 28, 1977.
30	—Jury trial resumed from Nov. 29, 1977.
Dec. 1	—Jury trial resumed from Nov. 30, 1977.
Dec. 2	—Jury trial resumed from Dec. 1, 1977.
5	—Jury trial resumed from Dec. 2, 1977.
6	—Jury trial resumed from Dec. 6, 1977.
7	—Jury trial resumed from Dec. 6, 1977.
8	—Jury trial resumed from Dec. 7, 1977.

9—Jury trial resumed from Dec. 8, 1977.
12—Jury trial resumed from Dec. 12, 1977.
13—Jury trial resumed from Dec. 12, 1977.
14—Jury trial resumed from Dec. 13, 1977.
15—Jury trial resumed from Dec. 14, 1977.
Dec. 16—Jury trial resumed from Dec. 15, 1977.
19—Jury trial resumed from Dec. 16, 1977.
20—Jury trial resumed from Dec. 19, 1977.
21—Jury trial resumed from Dec. 20, 1977.
27—Jury trial resumed from Dec. 21, 1977.
28—Jury trial resumed from Dec. 27, 1977.
Dec. 28—Jury trial resumed from Dec. 27, 1977.
29—Jury trial resumed from Dec. 28, 1977.
30—Jury trial resumed from Dec. 29, 1977.

1978

Jan. 3—Jury trial resumed from Dec. 30, 1977.
Jan. 9—Jury trial resumed from Jan. 3, 1978.
10—Jury trial resumed from Jan. 9, 1978.
11—Jury trial resumed from Jan. 10, 1978.
Jan. 12—Jury trial resumed Jan. 11, 1978.
16—Jury trial resumed from Jan. 12, 1978.
17—Jury trial resumed from Jan. 16, 1978.
18—Jury trial resumed from Jan. 17, 1978.
19—Jury trial resumed from Jan. 18, 1978.
20—Jury trial resumed from Jan. 19, 1978.
23—Jury trial resumed from Jan. 20, 1978.
24—Jury trial resumed from Jan. 23, 1978.
25—Jury trial resumed from Jan. 24, 1978.

26—Jury trial resumed from Jan. 25, 1978.

27—Jury trial resumed from Jan. 26, 1978.

28—Jury trial resumed from Jan. 27, 1978.

Jury retires at 5:40 PM.

30—Jury trial resumed from Jan. 28, 1978.
Jury resumed deliberations.
Jury retires for the night.

31—Jury trial resumed from Jan. 30, 1978.
Jury deliberating.
Jury retired for the night.

Feb. 2—Jury trial resumed from Feb. 1, 1978.
Jury deliberating.

3—Jury trial resumed from Feb. 2, 1978.
Jury deliberating.

4—Jury trial resumed from Feb. 3, 1978.
Jury deliberating.

Feb. 6—Jury trial resumed from Feb. 4, 1978.
Jury deliberating.

7—Jury trial resumed from Feb. 6, 1978.
Jury deliberating.

8—Jury trial resumed from Feb. 7, 1978.
Jury deliberating.

9—Jury trial resumed from Feb. 8, 1978.
Jury deliberating.

10—Jury trial resumed from Feb. 9, 1978.
Jury deliberating.

13—Jury trial resumed from Feb. 10, 1978.
Jury deliberating.

14—Jury trial resumed from Feb. 13, 1978.
Jury deliberating.

15—Jury trial resumed from Feb. 14, 1978.
Jury deliberating.

16—Jury trial resumed from Feb. 15, 1978.
Jury deliberating.

17—Jury trial resumed from Feb. 16, 1978. Jury deliberating.

20—Jury trial resumed from Feb. 17, 1978. Jury deliberating.

21—Jury trial resumed from Feb. 20, 1978. Jury deliberating.

22—Jury trial resumed from Feb. 21, 1978. Jury deliberating.

23—Jury trial resumed from Feb. 22, 1978. Jury deliberating.

24—Jury trial resumed from Feb. 23, 1978. Jury deliberating. Jury returns in open court and announces that they have reached their verdicts.

Verdict read in open court.

Verdict=1, 2, 28 & 29 guilty. Jury polled=all agreed.

Judgment of acquittal as to all not guilty verdicts.

28—SPECIAL VERDICTS: Forfeitures of $75.000.00 to US Government.

Forfeitures of $75,00.00 to US Government.

Forfeitures of $161,190.43 to US Government.

Apr. 7—Adjudged guilty as to cts. 1, 2, 21 and 22.

Apr. 7—SENTENCE: 10 yrs. ct. 1, 10 yrs. ct. 2, 5 yrs. ct. 28, 5 yrs. ct. 29, all to run concurrently under Title 18; USC, Section 4205(b)(2).

14—Notice of Appeal (cc to USCA).

Nov. 17—Order and judgment of forfeiture.

27—Notice of appeal.

Dec. 18—Order from U.S.C.A. that all forfeitures are stayed pending further order of this court.

1979

Jan. 3—Order from USCA denying appellant's motion to stay an order and judgment of forfeiture pending appeal.

Jan. 22—Order from USCA DENIED DEFT. Motion for reconsideration of judgment of forfeiture.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 77-00053-CR-I-H

VIOLATIONS:

[18 U.S.C. 1962(d)
18 U.S.C. 1962(c)
18 U.S.C. 1341
18 U.S.C. 2]

UNITED STATES OF AMERICA

vs.

JOSEPH J. CARTER, A/K/A "Joe", PAUL GUARINO, FRANK SCIONTI, JOHN THOMAS RIVERA, A/K/A "Johnny Rivera", "Scarface Rivera", RICHARD VICTOR ARRIGO, A/K/A "Vic Rossi", JOE GOMEZ, JIMMY FARINA, MANUEL EUFEMIO FERNANDEZ, JR., JOHN NICHOLAS LOSTRACCO, SAM C. MARTINO, WILLIE NORIEGA, A/K/A "Bill", AMALIA MORGADO, JOSEPH MACALUSO, A/K/A "Joe", JOSEPH D. LAZZARA, A/K/A "Joe", ROLANDO GONZALEZ RODRIGUEZ, A/K/A "Roland Rodriguez", JOSEPH C. RUSSELLO, A/K/A "Joe", BERTON B. CHASE, A/K/A "Bert", ROSARIO PALERMO, WILLIAM H. BROWN, A/K/A "Bill", JOHN D. FISHER, ROBERT D. YOUNG, RICHARD W. STARK, AND JOHN ALAN HOLT.

I N D I C T M E N T
(Redacted to Counts relating to Defendant Russello)

THE GRAND JURY CHARGES:

COUNT ONE

That from in or about September, 1972, and continuously thereafter up to and including the date of the filing of this Indictment, in the Middle District of Florida and elsewhere,

JOSEPH J. CARTER, a/k/a "Joe",
PAUL GUARINO,
FRANK SCIONTI,
JOHN THOMAS RIVERA, a/k/a
"Johnny Rivera", "Scarface Rivera",
RICHARD VICTOR ARRIGO, a/k/a
"Vic Rossi",
JOE GOMEZ,
JIMMY FARINA,
MANUEL EUFEMIO FERNANDEZ, JR.,
JOHN NICHOLAS LOSTRACCO,
SAM C. MARTINO,
WILLIE NORIEGA, a/k/a "Bill",
AMALIA MORGADO,
JOSEPH MACALUSO, a/k/a "Joe",
JOSEPH D. LAZZARA, a/k/a "Joe",
ROLANDO GONZALEZ RODRIGUEZ,
a/k/a "Roland Rodriguez",
JOSEPH C. RUSSELLO, a/k/a "Joe",
BERTON B. CHASE, a/k/a "Bert",
ROSARIO PALERMO,
WILLIAM H. BROWN, a/k/a "Bill",
JOHN D. FISHER,
ROBERT D. YOUNG,
RICHARD W. STARK, AND
JOHN ALAN HOLT,

the defendants herein, and others who are both known and unknown to the Grand Jury, did unlawfully, knowingly, and willfully, conspire, combine, confederate, and agree together, and with each other to commit an offense against the United States, that is: To conduct and to participate directly and indirectly in the conduct of the affairs of an enterprise through a pattern of racketeering activity in violation of Section 1962(c) of Title 18 of the United States Code as hereinafter described:

1. *Purpose of the Enterprise:* The aforesaid defendants,

JOSEPH J. CARTER, a/k/a "Joe",
PAUL GUARINO,
FRANK SCIONTI,
JOHN THOMAS RIVERA, a/k/a
"Johnny Rivera", "Scarface Rivera",
RICHARD VICTOR ARRIGO, a/k/a
"Vic Rossi",
JOE GOMEZ,
JIMMY FARINA,
MANUEL EUFEMIO FERNANDEZ, JR.,
JOHN NICHOLAS LOSTRACCO,
SAM C. MARTINO,
WILLIE NORIEGA, a/k/a "Bill",
AMALIA MORGADO,
JOSEPH MACALUSO, a/k/a "Joe",
JOSEPH D. LAZZARA, a/k/a "Joe"
ROLANDO GONZALEZ RODRIGUEZ, a/k/a
"Roland Rodriguez",
JOSEPH C. RUSSELLO, a/k/a "Joe"
BERTON B. CHASE, a/k/a "Bert",
ROSARIO PALERMO,
WILLIAM H. BROWN, a/k/a "Bill",
JOHN D. FISHER,
ROBERT D. YOUNG,
RICHARD W. STARK, AND
JOHN ALAN HOLT,

were associated together in fact as an Enterprise as defined by Section 1961(4), Title 18, United States Code, to-wit: a group of individuals associated in fact for the purpose of defrauding certain insurance companies by use of the mails and by committing and causing to be committed acts of arson, in violation of Section 1341, Title 18, United States Code, and Sections 806.01, 860.02, 806.06, 817.233, and 777.011, Florida statutes.

2. *Interstate Commerce:* At all times pertinent to this Indictment, the said Enterprise did engage in and its activities did affect interstate commerce.

3. *The Agreement:*

(a) It was a part of the conspiracy that the defendants

JOSEPH J. CARTER, a/k/a "Joe",
PAUL GUARINO,
FRANK SCIONTI,
JOHN THOMAS RIVERA, a/k/a "Johnny Rivera", "Scarface Rivera",
RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi",
JOE GOMEZ,
JIMMY FARINA,
MANUEL EUFEMIO FERNANDEZ, JR.,
JOHN NICHOLAS LOSTRACCO,
SAM C. MARTINO,
WILLIE NORIEGA, a/k/a "Bill",
AMALIA MORGADO,
JOSEPH MACALUSO, a/k/a "Joe",
JOSEPH D. LAZZARA, a/k/a "Joe",
ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez",
JOSEPH C. RUSSELLO, a/k/a "Joe",
BERTON B. CHASE, a/k/a "Bert",
ROSARIO PALERMO,
WILLIAM H. BROWN, a/k/a "Bill",
JOHN D. FISHER,
ROBERT D. YOUNG,
RICHARD W. STARK, AND
JOHN ALAN HOLT,

and others, both known and unknown to the Grand Jury, would conduct the affairs of the said Enterprise through a pattern of racketeering activity, that is:

(1) That said defendants and others, would commit and willfully cause to be committed multiple acts of mail fraud in violation of Sections 1341 and 2 of Title 18, United States Code, that is having devised and intending to devise

a scheme and artifice to defraud certain insurance companies enumerated below and to obtain money and property therefrom by means of false and fraudulent pretenses, representations and promises regarding the facts and circumstances of certain fires which damaged or destroyed certain buildings in and around the City of Tampa, Florida, and elsewhere; for purposes of executing and attempting to execute the said scheme and artifice to defraud, the said defendants and others, did knowingly and willfully place and cause to be placed envelopes in authorized depositories for mail matter to be sent and delivered according to the diretions thereon by the Postal Service of the United States, said envelopes containing Proof of Loss statements, written communications, memoranda, checks and drafts, all relating to policies, claims and properties more particularly described herein and as alleged in Counts Three through Thirty-five of the instant Indictment.

(2) That said defendants and others, would commit and willfully cause to be committed multiple acts of arson, that is, the defendants and others, both known and unknown unto the Grand Jury, with intent to defraud the insurers of buildings in Tampa, Florida, and elsewhere, intentionally caused said buildings to be burned and damaged in violation of Sections 806.01, 806.02, 806.06, 817.233, and 777.011, Florida statutes, as alleged in sub-paragraphs (34) through (56) of paragraph 5 in Count Two of the instant Indictment.

(b) It was further part of the conspiracy that, among other things, the defendant JOSEPH J. CARTER, a/k/a "Joe" would adjust numerous fraudulent property loss claims and submit the claims to certain insurance companies with knowledge that the loss was caused by arson

committed by various members of the Enterprise for the purpose of fraudulently collecting insurance monies in settlement of the fraudulent claims.

(c) It was further part of the conspiracy that, among other things, the defendant JOSEPH J. CARTER, a/k/a "Joe", would receive a portion of insurance monies received by certain members of the Enterprise for his assistance and efforts in obtaining favorable and expeditious settlements of fraudulent property loss claims adjusted by him which arose out of the arson activities of the Enterprise.

(d) It was further part of the conspiracy that, among other things, JOSEPH J. CARTER, a/k/a "Joe", would direct members of the Enterprise to particular insurance agencies for the purpose of acquiring fire insurance coverage on property intended for burning in order to increase CARTER's chances of being assigned future property adjustments arising from the Enterprise's arson activities.

(e) It was further part of the conspiracy that, among other things, the defendant JOE GOMEZ, while employed as Fire Marshal of the City of Tampa, Florida, would provide certain members of the Enterprise with information concerning current investigations being conducted by his office into the arson activities of the Enterprise in order to protect and conceal the illegal activities of the Enterprise.

(f) It was further part of the conspiracy that, among other things, SAM C. MARTINO would arrange loans for certain members of the Enterprise through his companies, Ybor Loan Company and M&S Investment Company, as well as third party investors, in order to finance the

purchase and repairs of property intended to be burned for the fraudulent recovery of insurance proceeds.

(g) It was further part of the conspiracy that, among other things, SAM C. MARTINO would utilize his real estate brokerage company, "Sam C. Martino Realty", to find and acquire property which the Enterprise would burn to fraudulently collect insurance monies.

(h) It was further part of the conspiracy that, among other things, BERTON B. CHASE, a/k/a "Bert", would arrange a loan for certain members of the Enterprise in order to finance repairs and fire insurance premiums for a building intended to be burned for the fraudulent recovery of insurance proceeds.

(i) It was further part of the conspiracy that JOSEPH J. CARTER, a/k/a "Joe", PAUL GUARINO, SAM C. MARTINO, WILLIE NORIEGA, a/k/a "Bill", JOSEPH MACALUSO, a/k/a "Joe", AMALIA MORGADO, JOHN D. FISHER, ROBERT D. YOUNG, and JOHN ALAN HOLT, would acquire and cause to be acquired certain buildings in Tampa, Florida, for the purpose of burning such building in order to fraudulently obtain insurance monies from the insurers of such buildings.

(j) It was further part of the conspiracy that PAUL GUARINO, ROSARIO PALERMO, WILLIE NORIEGA, a/k/a "Bill", JOSEPH MACALUSO, a/k/a "Joe", AMALIA MORGADO, SAM C. MARTINO, JOE GOMEZ, BERTON B. CHASE, a/k/a "Bert", JOSEPH J. CARTER, a/k/a "Joe", JOHN D. FISHER, and ROBERT D. YOUNG, would make or cause to be made minor repairs and improvements on buildings acquired for burning for

the purpose of fraudulently obtaining the maximum fire insurance coverage possible on such buildings.

(k) It was further part of the conspiracy that JOSEPH J. CARTER, a/k/a "Joe", PAUL GUARINO, FRANK SCIONTI, JOHN THOMAS RIVERA, a/k/a "Johnny Rivera", "Scarface Rivera", JOHN NICHOLAS LOSTRACCO, AMALIA MORGADO, and ROSARIO PALERMO, would arrange for members of the Enterprise to burn buildings for certain property owners in and around Tampa, Florida, and elsewhere, for the purpose of fraudulently obtaining insurance money.

(l) It was further part of the conspiracy that PAUL GUARINO, FRANK SCIONTI, WILLIE NORIEGA, a/k/a "Bill", RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi", JOHN ALAN HOLT, and JOSEPH MACALUSO, a/k/a "Joe", would act as arsonists or "torches" who actually burned buildings for the Enterprise utilizing various combustible materials, hot plates and containers.

(m) It was further part of the conspiracy that JIMMY FARINA, MANUEL EUFEMIO FERNANDEZ, JR., JOSEPH D. LAZZARA, a/k/a "Joe", ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez", JOSEPH C. RUSSELLO, a/k/a "Joe", ROSARIO PALERMO, WILLIAM H. BROWN, a/k/a "Bill", JOHN D. FISHER, ROBERT D. YOUNG, RICHARD W. STARK, JOHN ALAN HOLT, JOSEPH MACALUSO, a/k/a "Joe" PAUL GUARINO, WILLIE NORIEGA, a/k/a "Bill", JOE GOMEZ, AMALIA MORGADO, FRANK SCIONTI, and SAM C. MARTINO, would acquire the arson services of the Enterprise to burn buildings in which they had financial interests in order to fraudulently obtain insurance money.

(n) It was further part of the conspiracy that, among other things, the defendants JOSEPH D. LAZZARA, a/k/a "Joe", ROSARIO PALERMO, FRANK SCIONTI, ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez", JOSEPH MACALUSO, a/k/a "Joe", JIMMY FARINA, WILLIE NORIEGA, a/k/a "Bill", PAUL GUARINO, AMALIA MORGADO, SAM C. MARTINO, MANUEL EUFEMIO FERNANDEZ, JR., RICHARD W. STARK, JOSEPH C. RUSSELLO, a/k/a "Joe", JOSEPH J. CARTER, a/k/a "Joe", JOHN ALAN HOLT, and others, would receive proceeds from certain bank drafts issued by insurance companies in payment and settlement of fraudulent property loss claims arising out of the numerous arsons committed and caused to be committed by members of the Enterprise.

4. *Overt Acts of the Conspiracy*:

In furtherance of the conspiracy and to effect the objects thereof, at least one of the defendants committed at least one of the following overt acts among others with respect to the following described property:

1202 East Buffalo Avenue,
Tampa, Florida

1. On or about September 28, 1972, PAUL GUARINO, FRANK SCIONTI, Lester Oates, and Robert Bradwell, willfully started and caused to be started, a fire on the premises at 1202 East Buffalo Avenue, Tampa, Florida.

3401 Twenty-fourth Street,
Tampa, Florida

2. On or about July 21, 1973, FRANK SCIONTI, PAUL GUARINO, and WILLIE NORIEGA, a/k/a "Bill",

willfully started a fire on the premises at 3401 Twenty-fourth Street, Tampa, Florida.

1811 Taliaferro Street,
Tampa, Florida

3. In or about early September, 1973, PAUL GUARINO, ROSARIO PALERMO, and WILLIE NORIEGA, a/k/a "Bill", met in Tampa, Florida and discussed burning the premises at 1811 Taliaferro Street for insurance money.

4. In or about mid-September, 1973, PAUL GUARINO, JOE GOMEZ, and WILLIE NORIEGA, a/k/a "Bill", met at the 1811 Taliaferro Street premises and GUARINO told NORIEGA that GOMEZ was a "silent partner" in the ownership of said premises.

5. On or about September 28, 1973, PAUL GUARINO, FRANK SCIONTI, and WILLIE NORIEGA, a/k/a "Bill", willfully started a fire on the premises at 1811 Taliaferro Street, Tampa, Florida.

6. On or about November 28, 1973, ROSARIO PALERMO submitted a signed and sworn statement in Proof of Loss form to Gay and Taylor, Inc., adjusters, Tampa, Florida, stating that the cause and origin of the fire loss at 1811 Taliaferro Street were "possible arson".

20410 Old Cutler Road,
Miami, Florida

7. In or about September, 1973, JOHN THOMAS RIVERA, a/k/a "Johnny Rivera", "Scarface Rivera", paid WILLIE NORIEGA approximately two hundred ($200.00) dollars to drive Hiram McElroy to the City

Wide Speed Queen Coin Laundry, at 20410 Old Cutler Road, Miami, Florida.

8. On or about October 2, 1973, PAUL GUARINO, FRANK SCIONTI and WILLIE NORIEGA, a/k/a "Bill", willfully started a fire on the laundry premises at 20410 Old Cutler Road, Miami, Florida.

9. On or about May 7, 1974, JOSEPH D. LAZZARA, a/k/a "Joe", d/b/a Conjo, Inc., submitted a sworn statement in Proof of Loss form to Allstate Insurance Company, in substantiation of a fraudulent claim, stating therein that the cause and origin of the fire loss at 20410 Old Cutler Road, were "unknown-undetermined".

2208 Tenth Street and 923 Twelfth Avenue, Tampa, Florida

10. In or about the latter part of November, 1973, WILLIE NORIEGA, a/k/a "Bill" and ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez" discussed burning the buildings located at 2208 Tenth Street and 923 Twelfth Avenue, Tampa, at the El Buen Gusto Restaurant in the Ybor City Section of Tampa.

11. On or about December 1, 1973, PAUL GUARINO, WILLIE NORIEGA, a/k/a "Bill", and JOSEPH MACALUSO, a/k/a "Joe", willfully started fires at the buildings located at 2208 Tenth Street and 923 Twelfth Avenue.

12. On or about December 4, 1973, JOSEPH J. CARTER, a/k/a "Joe" acquired the insurance adjusting assignment on the fire loss claims arising from the December 1, 1973 fires at 2208 Tenth Street and 923 Twelfth Avenue.

13. On or about January 30, 1974, ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez" and Julie Rodriguez filed two signed and sworn statements in Proof of Loss forms with Crawford and Company, insurance adjusters, Tampa, Florida, in substantiation of a fraudulent claim, stating therein that the cause and origin of the fire losses at 2208 Tenth Street and 923 Twelfth Avenue premises were of an "undetermined origin".

2917 and 2917½ Twentieth Avenue,
Tampa, Florida

14. In or about January, 1974, JIMMY FARINA, SAM C. MARTINO, and WILLIE NORIEGA, a/k/a "Bill", met at the Martino Real Estate office in Tampa and discussed burning the building at 2917 and 2917½ Twentieth Avenue, Tampa, for the insurance money.

15. On or about February 5, 1974, PAUL GUARINO and WILLIE NORIEGA, a/k/a "Bill", willfully started a fire on the premises at 2917 and 2917½ Twentieth Avenue, Tampa, Florida.

16. On or about May 22, 1974, JIMMY FARINA and others submitted a signed and sworn statement in Proof of Loss form with Peninsular Fire Insurance Company, in substantiation of a fraudulent claim, stating therein that the cause and origin of the fire loss at 2917 and 2917½ Twentieth Avenue were "fire of undetermined origin".

3006 North Nebraska Avenue,
Tampa, Florida

17. On or about November 13, 1973, SAM C. MARTINO arranged a loan of approximately seven thousand ($7,000.00) dollars for PAUL GUARINO and WILLIE

NORIEGA, a/k/a "Bill" for the purpose of purchasing and burning certain property located at 3006 North Nebraska Avenue, Tampa, Florida, in order to collect insurance money.

18. On or about January 24, 1974, JOSEPH MACALUSO, a/k/a "Joe" caused to be issued an insurance policy by the Sentry Indemnity Company, insuring the premises at 3006 North Nebraska Avenue, against fire loss in the amount of $20,000.00 and contents in the amount of $10,000.0.

19. On or about February 11, 1974, WILLIE NORIEGA, a/k/a "Bill" willfully started a fire on the premises at 3006 North Nebraska Avenue.

20. On or about April 11, 1974, JOSEPH J. CARTER, a/k/a "Joe", acquired a signed and sworn Proof of Loss statement from JOSEPH MACALUSO, a/k/a "Joe", with regard to the fire at 3006 North Nebraska Avenue, wherein JOSEPH MACALUSO, a/k/a "Joe", stated that the cause and origin of the fire loss were "persons responsible are unknown".

21. On or about April 16, 1974, AMALIA MORGADO, SAM C. MARTINO, JOSEPH MACALUSO, a/k/a "Joe", and WILLIE NORIEGA, a/k/a "Bill", met at the Broadway Bank in the Ybor City section of Tampa and cashed the 3006 North Nebraska fire settlement checks in the total amount of $23,000.00.

2020 East Columbus Drive,
Tampa, Florida

22. On or about January 15, 1974, SAM C. MARTINO caused to be prepared a Warranty Deed from a

Bessie Mae Williams to Bill Noriega and wife, Carol Noriega, conveying the premises located at 2020 East Columbus Drive, Tampa.

23. On or about April 15, 1974, PAUL GUARINO and WILLIE NORIEGA, a/k/a "Bill" willfully started a fire on the premises located at 2020 East Columbus Drive.

24. On or about May 7, 1974, JOSEPH J. CARTER, a/k/a "Joe", acquired a signed and sworn Proof of Loss statement from WILLIE NORIEGA, a/k/a "Bill", with regard to the April 15, 1974, fire at 2020 East Columbus Drive.

2114 Twenty-seventh Street,
Tampa, Florida

25. In or about May, 1974, JOHN NICHOLAS LOSTRACCO, PAUL GUARINO, and WILLIE NORIEGA, a/k/a "Bill", had a discussion in Tampa, Florida, about burning the premises at 2114 Twenty-seventh Street, Tampa, for the purpose of collecting the insurance money.

26. On or about May 28, 1974, WILLIE NORIEGA, a/k/a "Bill" willfully started a fire on the premises of 2114 Twenty-seventh Street.

27. On or about June 6, 1974, JOSEPH J. CARTER, a/k/a "Joe", acquired a signed and sworn statement in Proof of Loss form from Joe Bartolotti which stated therein that the cause and origin of the fire were "persons unknown set fire to insured's rental property".

409 East Oak Street,
Tampa, Florida

28. On or about September 6, 1973, PAUL GUARINO caused to be issued a fire insurance policy by the National Union Fire Insurance Company, insuring the premises at 409 East Oak Street, Tampa, against fire loss in the amount of $41,000.00.

29. In or about July, 1974, JOE GOMEZ had a discussion with PAUL GUARINO and WILLIE NORIEGA, a/k/a "Bill" in Tampa, Florida, at which time GOMEZ assured GUARINO and NORIEGA that the fire Marshal's office was not conducting a "stake-out" on the premises at 409 East Oak Street.

30. On or about July 16, 1974, PAUL GUARINO and WILLIE NORIEGA, a/k/a "Bill", willfully started a fire on the premises at 409 East Oak Street.

31. On or about July 30, 1974, PAUL GUARINO filed a signed and sworn statement in Proof of Loss form with the General Adjustment Bureau, Tampa, Florida, in substantiation of a fraudulent claim, stating therein that the cause and origin of the fire loss at 409 East Oak Street were "fire possibly caused by unknown arsonist".

3310 Vasconia Street,
Tampa, Florida

32. On or about July 23, 1974, JOHN ALAN HOLT caused to be issued a fire insurance policy by the Fireman's Fund American Insurance Company insuring the premises at 3310 Vasconia Street, Tampa, for fire and extended coverage protection for the period July 23, 1974 to July 23, 1975.

33. On or about July 31, 1974, JOHN ALAN HOLT caused the dwelling coverage limits on his fire insurance

policy with Safeco Insurance Company insuring the premises at 3310 Vasconia Street to be raised from $20,000.00 to $30,000.00.

34. On or about August 2, 1974, AMALIA MORGADO delivered unto WILLIE NORIEGA, a/k/a "Bill", a one thousand ($1,000.00) dollar check, number 513, payable to cash and drawn on the Peoples Bank of Tampa, as partial payment to NORIEGA and RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi", for burning the premises at 3310 Vasconia Street, Tampa.

35. On or about August 3, 1974, RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi" and WILLIE NORIEGA, a/k/a "Bill", willfully started a fire on the premises at 3310 Vasconia Street.

36. On or about October 11, 1974, JOHN ALAN HOLT filed a signed and sworn Proof of Loss statement with Safeco Insurance Company, in substantiation of a fraudulent claim, stating therein that the cause of the fire loss at 3310 Vasconia Street was "fire of unknown origin".

4509 West Alva Street,
Tampa, Florida

37. On or about August 1, 1974, PAUL GUARINO delivered a kerosene drum to WILLIE NORIEGA, a/k/a "Bill", in Tampa, Florida.

38. On or about August 4, 1974, RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi" and WILLIE NORIEGA, a/k/a "Bill", willfully started a fire at 4509 West Alva Street, Tampa.

39. On or about September 26, 1974, MANUEL EUFEMIO FERNANDEZ, JR. submitted a signed and sworn

statement in Proof of Loss form with Crawford & Company, Insurance Adjusters, Tampa, Florida, in substantiation of a fraudulent claim, stating therein that the cause and origin of the fire loss at 4509 West Alva Street were "unknown to insured".

2701 S. MacDill Avenue,
Tampa, Florida

40. On or about September 1, 1974, RICHARD W. STARK, RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi", and WILLIE NORIEGA, a/k/a "Bill", met at Pam Liquors, Tampa, Florida, and discussed burning the premises at 2701 S. MacDill Avenue, Tampa, for the purpose of collecting the insurance money.

41. On or about September 5, 1974, WILLIE NORIEGA, a/k/a "Bill", willfully started a fire on the premises at 2701 S. MacDill Avenue.

42. On or about September 23, 1974, RICHARD W. STARK and his wife, Alice, submitted a signed and sworn statement in Proof of Property Loss form to Sentry Insurance Company, in substantiation of a fraudulent claim, stating therein that the manner in which the fire loss occurred at 2701 S. MacDill Avenue was "loss by fire—premises totally destroyed; the insured has no knowledge of any persons known or suspected to have been implicated in loss".

316 E. Park Avenue,
Tampa, Florida

43. In or about July, 1975, PAUL GUARINO, FRANK SCIONTI and WILLIE NORIEGA, a/k/a "Bill", met in Tampa, Florida, and discussed burning the

premises at 316 E. Park Avenue, Tampa, at the behest of ROSARIO PALERMO.

44. On or about July 24, 1975, WILLIE NORIEGA, a/k/a "Bill", willfully started a fire on the premises at 316 E. Park Avenue.

45. On or about July 24, 1975, PAUL GUARINO and FRANK SCIONTI acted as "lookouts" for WILLIE NORIEGA, a/k/a "Bill" while he started a fire at the 316 E. Park Avenue premises.

46. In or about August, 1975, JOSEPH J. CARTER, a/k/a "Joe" and WILLIE NORIEGA, a/k/a "Bill", met in Tampa, Florida, and discussed settlement of the fire loss claim at 316 E. Park Avenue.

4601 W. Kennedy Boulevard,
Tampa, Florida

47. In or about June, 1975, in Tampa, Florida, JOSEPH C. RUSSELLO, a/k/a "Joe", BERTON B. CHASE, a/k/a "Bert", and WILLIE NORIEGA, a/k/a "Bill", discussed CHASE lending RUSSELLO ten thousand ($10,000.00) dollars which was to be paid NORIEGA for burning the 4601 W. Kennedy Boulevard premises for RUSSELLO.

48. In or about August, 1975, AMALIA MORGADO and WILLIE NORIEGA, a/k/a "Bill" had a telephone conversation in Tampa, Florida, and discussed burning an automobile belonging to JOHN ALAN HOLT.

49. On or about August 17, 1975, WILLIE NORIEGA, a/k/a "Bill" willfully started a fire at the premises located at 4601 W. Kennedy Boulevard, which damaged a 1973 Ford Gran Torino station wagon owned by JOSEPH D. LAZZARA, a/k/a "Joe", a 1972 Pontiac Ventura owned

by JOHN ALAN HOLT, as well as the 4601 W. Kennedy Boulevard premises.

50. On or about August 20, 1975, JOSEPH J. CARTER, a/k/a "Joe" acquired a signed and sworn partial Proof of Loss statement from JOSEPH C. RUSSELLO, a/k/a "Joe" in substantiation of a fraudulent claim with regard to the August 17, 1975 fire loss at 4601 W. Kennedy Boulevard.

2510 Twelfth Street,
Tampa, Florida

51. On or about December 20, 1973, SAM C. MARTINO, as president of M & S Investment Corporation, acquired an option to purchase the premises at 2510 Twelfth Street, Tampa, Florida, on behalf of PAUL GUARINO, WILLIE NORIEGA, a/k/a "Bill", and himself for the purpose of burning said premises.

52. In or about May, 1974, PAUL GUARINO paid SAM C. MARTINO one thousand five hundred ($1,500.00) dollars in consideration for MARTINO's assignment to Alexander Fekete of the option to purchase the premises at 2510 Twelfth Street.

53. In or about June, 1974, PAUL GUARINO, JOE GOMEZ, and WILLIE NORIEGA, a/k/a "Bill", met at the residence of GOMEZ' sister located on Cypress Street, Tampa, and GOMEZ delivered two thousand ($2,000.00) dollars to GUARINO and NORIEGA to purchase an interest in the 2510 Twelfth Street premises.

54. On or about July 31, 1974, BERTON B. CHASE, a/k/a "Bert", drove Alexander Fekete to the Castaways Lounge in Tampa to meet WILLIE NORIEGA, a/k/a "Bill".

55. On or about July 31, 1974, Alexander Fekete delivered approximately four thousand two hundred ($4,-200.00) dollars to RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi" at the Castaways Lounge, Tampa.

56. On or about August 26, 1975, BERTON B. CHASE, a/k/a "Bert" and WILLIE NORIEGA, a/k/a "Bill" met at CHASE'S office in Tampa, at which time CHASE told NORIEGA to burn the 2510 Twelfth Street premises immediately.

57. On or about August 26, 1975, WILLIE NORIEGA, a/k/a "Bill", willfully started a fire on the premises at 2510 Twelfth Street.

8422 Lopez Drive,
Tampa, Florida

58. On or about September 20, 1975, JOSEPH J. CARTER, a/k/a "Joe", WILLIE NORIEGA, a/k/a "Bill", and Francis Carlevale met at CARTER'S office in Tampa, Florida, and discussed burning the premises at 8422 Lopez Drive, Tampa, for the insurance money.

59. On or about September 29, 1975, WILLIAM H. BROWN, a/k/a "Bill", drove WILLIE NORIEGA, a/k/a "Bill" to the premises at 8422 Lopez Drive so that NORIEGA could burn the premises.

3658 S. Westshore Boulevard,
Tampa, Florida

60. In or about August, 1975, JOSEPH J. CARTER, a/k/a "Joe", WILLIAM H. BROWN, a/k/a "Bill", and WILLIE NORIEGA, a/k/a "Bill" met at the Village Pub, Tampa, Florida, and discussed burning the Hardware Store at 3658 S. Westshore Boulevard, Tampa, Florida.

61. On or about October 27, 1975, WILLIE NORIEGA, a/k/a "Bill" willfully started a fire on the Hardware Store premises at 3658 S. Westshore Boulevard.

3012 Highland Avenue,
Tampa, Florida

62. On or about November 6, 1975, PAUL GUARINO and WILLIE NORIEGA, a/k/a "Bill" willfully started a fire on the premises located at 3012 Highland Avenue, Tampa, Florida.

8909 N. Florida Avenue,
Tampa, Florida

63. On or about March 27, 1976, JOHN THOMAS RIVERA, a/k/a "Johnny Rivera", "Scarface Rivera" delivered to WILLIE NORIEGA, a/k/a "Bill", several trash cans containing gasoline while RIVERA and NORIEGA were at RIVERA's residence on Davis Island, Tampa, Florida.

1907-15 N. Armenia Avenue,
Tampa, Florida

64. In or about December, 1975, JOSEPH J. CARTER, a/k/a "Joe" and WILLIE NORIEGA, a/k/a "Bill" met in Tampa, Florida, at which time, CARTER instructed NORIEGA to purchase the premises at 1907-15 N. Armenia Avenue, Tampa, Florida, for the purpose of burning it for insurance money.

65. On or about January 1, 1976, William Hiram Fisher purchased the premises at 1907-15 N. Armenia Avenue.

66. In or about February, 1976, JOHN D. FISHER, ROBERT D. YOUNG, and WILLIE NORIEGA, a/k/a

"Bill" met at the Sportsman Lounge, in Tampa, and discussed the purchase of the premises at 1907-15 N. Armenia Avenue, for the purpose of burning it for insurance money.

67. On or about February 26, 1976, JOHN D. FISHER purchased the premises at 1907-15 N. Armenia Avenue from William Hiram Fisher.

68. On or about April 13, 1976, JOHN ALAN HOLT and WILLIE NORIEGA, a/k/a "Bill" willfully started a fire on the premises at 1907-15 N. Armenia Avenue.

69. On or about May 19, 1976, JOHN D. FISHER caused to be submitted signed and sworn Proof of Loss statement forms to Monarch Adjusting, Inc., Ft. Lauderdale, Florida, in substantiation of a fraudulent claim, stating therein that the cause and origin of the fire at "1909-1915" N. Armenia Avenue were "fire".

All in violation of Section 1962(d), Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT TWO

That continuously from in or about September, 1972, and continuously thereafter up to and including the date of the filing of this Indictment, in the Middle District of Florida and elsewhere,

JOSEPH J. CARTER, a/k/a "Joe",
PAUL GUARINO,
FRANK SCIONTI,
JOHN THOMAS RIVERA, a/k/a
"Johnny Rivera", "Scarface Rivera",
RICHARD VICTOR ARRIGO, a/k/a
"Vic Rossi",

JOE GOMEZ,
JIMMY FARINA,
MANUEL EUFEMIO FERNANDEZ, JR.,
JOHN NICHOLAS LOSTRACCO,
SAM C. MARTINO,
WILLIE NORIEGA, a/k/a "Bill",
AMALIA MORGADO,
JOSEPH MACALUSO, a/k/a "Joe",
JOSEPH D. LAZZARA, a/k/a "Joe",
ROLANDO GONZALEZ RODRIGUEZ,
a/k/a "Roland Rodriguez",
JOSEPH C. RUSSELLO, a/k/a "Joe",
ROSARIO PALERMO,
WILLIAM H. BROWN, a/k/a "Bill",
JOHN D. FISHER,
ROBERT D. YOUNG,
RICHARD W. STARK, AND
JOHN ALAN HOLT,

the defendants herein, and others who are both known and unknown to the Grand Jury, unlawfully, knowingly, and willfully, did conduct and participate, directly and indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity as hereinafter described:

1. That the aforesaid defendants,

JOSEPH J. CARTER, a/k/a "Joe",
PAUL GUARINO,
FRANK SCIONTI,
JOHN THOMAS RIVERA, a/k/a
"Johnny Rivera", "Scarface Rivera",
RICHARD VICTOR ARRIGO, a/k/a
"Vic Rossi",
JOE GOMEZ,
JIMMY FARINA,
MANUEL EUFEMIO FERNANDEZ, JR.,
JOHN NICHOLAS LOSTRACCO,

SAM C. MARTINO,
WILLIE NORIEGA, a/k/a "Bill",
AMALIA MORGADO,
JOSEPH MACALUSO, a/k/a "Joe",
JOSEPH D. LAZZARA, a/k/a "Joe",
ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez",
JOSEPH C. RUSSELLO, a/k/a "Joe",
ROSARIO PALERMO,
WILLIAM H. BROWN, a/k/a "Bill",
JOHN D. FISHER,
ROBERT D. YOUNG,
RICHARD W. STARK, AND
JOHN ALAN HOLT,

were associated together in fact as an Enterprise, as described by Title 18, United States Code, Section 1961(4), to-wit: a group of individuals associated in fact for the purpose of defrauding certain insurance companies by use of the mails, and by committing acts of arson, in violation of Section 1341, Title 18, United States Code, and Sections 806.01, 806.02, 806.06, 817.233, and 777.011, Florida statutes.

2. At all times pertinent to this Indictment, said Enterprise did engage in and its activities did affect interstate commerce.

3. At all times pertinent to this Indictment, the defendants conducted the affairs of said Enterprise through a pattern of racketeering activity, that is:

(a) Said defendants and others, did commit and willfully cause to be committed multiple acts of mail fraud in violation of Sections 1341 and 2 of Title 18, United States Code, that is, having devised and intending to devise a scheme and artifice to defraud certain insurance

companies enumerated below and to obtain money and property therefrom by means of false and fraudulent pretenses, representations and promises regarding the facts and circumstances of certain fires which damaged or destroyed certain buildings in and around Tampa, Florida, and elsewhere; for purposes of executing and attempting to execute the said scheme and artifice to defraud, the said defendants, and others, did knowingly and willfully place and cause to be placed envelopes in authorized depositories for mail matter to be sent and delivered according to the directions thereon by the Postal Service of the United States, said envelopes containing Proof of Loss statements, written communications, memoranda, checks, and drafts, all relating to policies, claims and properties more particularly described herein and as alleged in Counts Three through Thirty-Five of the instant Indictment.

(b) That said defendants and others, did commit and willfully cause to be committed multiple acts of arson, that is, said defendants, with intent to defraud the insurers of buildings, intentionally caused said buildings to be burned and damaged in violation of Sections 806.01, 806.02, 806.06, 817.233, and 777.011, Florida statutes, as more particularly alleged in sub-paragraphs (34) through (56) of paragraph 5 below of Count Two of the instant Indictment.

4. The following acts of racketeering activity, among others, were committed in the course of conducting the Enterprise's affairs:

5. *Acts of racketeering*: (1) through (33): Counts Three through Thirty-Five of the Indictment are incorpo-

rated and made a part of Count Two herein as separate and distinct acts of racketeering as though fully set forth and described herein as acts of racketeering.

(34) On or about September 28, 1972, PAUL GUARINO and FRANK SCIONTI, did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a building at 1202 East Buffalo Avenue, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.02 and 806.06, Florida statutes (1971).

(35) On or about July 21, 1973, PAUL GUARINO, FRANK SCIONTI, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a dwelling house at 3401 Twenty-fourth Street, Tampa, Florida, which dwelling house was insured at that time against loss or damage by fire, with intent to defraud the insurer of that dwelling house, contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(36) On or about September 28, 1973, PAUL GUARINO, FRANK SCIONTI, JOE GOMEZ, ROSARIO PALERMO, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a dwelling house at 1811 Taliaferro Street, Tampa, Florida, which dwelling house was insured at that time against loss or damage by fire, with intent to defraud the insurer of that dwelling house, contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(37) On or about October 2, 1973, JOSEPH D. LAZZARA, a/k/a "Joe", JOHN THOMAS RIVERA, a/k/a "Johnny Rivera", "Scarface Rivera", PAUL GUARINO, FRANK SCIONTI, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a building at 20410 Old Cutler Road, Miami, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.02 and 806.06, Florida statutes (1973).

(38) On or about December 1, 1973, ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez", JOSEPH J. CARTER, a/k/a "Joe", PAUL GUARINO, WILLIE NORIEGA, a/k/a "Bill", and JOSEPH MACALUSO, a/k/a "Joe", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of dwelling houses at 2208 Tenth Street and 923 Twelfth Avenue, Tampa, Florida, which dwelling houses were insured at that time against loss or damage by fire, with intent to defraud the insurer of those dwellings, contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(39) On or about February 5, 1974, JIMMY FARINA, SAM C. MARTINO, PAUL GUARINO, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a dwelling house at 2917 and 2917½ Twentieth Avenue, Tampa, Florida, which dwelling house was insured at that time against loss or damage by fire, with intent to defraud the insurer of that dwelling,

contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(40) On or about February 11, 1974, JOSEPH MACALUSO, a/k/a "Joe", SAM C. MARTINO, JOSEPH J. CARTER, a/k/a "Joe", AMALIA MORGADO, PAUL GUARINO, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a dwelling house at 3006 North Nebraska Avenue, Tampa, Florida, which dwelling house was insured at that time against loss or damage by fire, with intent to defraud the insurer of that dwelling, contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(41) On or about April 15, 1974, SAM C. MARTINO, JOE GOMEZ, JOSEPH J. CARTER, a/k/a "Joe", PAUL GUARINO, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a dwelling house at 2020 East Columbus Drive, Tampa, Florida, which dwelling house was insured at that time against loss or damage by fire, with intent to defraud the insurers of that dwelling, contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(42) On or about May 28, 1974, JOHN NICHOLAS LOSTRACCO, JOSEPH J. CARTER, a/k/a "Joe", PAUL GUARINO, and WILLIE NORIEGA, a/k/a "Bill", did willfully and mailciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a dwelling house at 2114 Twenty-seventh Street, Tampa, Florida, which dwelling house was insured at that time against loss or damage by fire, with intent to defraud the

insurer of that dwelling, contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(43) On or about July 16, 1974, PAUL GUARINO, JOSEPH J. CARTER, a/k/a "Joe", JOE GOMEZ, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a dwelling house at 409 East Oak Street, Tampa, Florida, which dwelling house was insured at that time against loss or damage by fire, with intent to defraud the insurer of that dwelling, contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(44) On or about August 3, 1974, JOHN ALAN HOLT, AMALIA MORGADO, JOSEPH MACALUSO, a/k/a "Joe", RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi", and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a dwelling house at 3310 Vasconia Street, Tampa, Florida, which dwelling house was insured at that time against loss or damage by fire, with intent to defraud the insurers of that dwelling, contrary to Sections 806.01 and 806.06, Florida statutes (1973).

(45) On or about August 4, 1974, MANUEL EUFEMIO FERNANDEZ, JR., PAUL GUARINO, RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi", and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a building at 4509 West Alva Street, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the

insurer of that building, contrary to Sections 806.02 and 806.06, Florida statutes (1973).

(46) On or about September 5, 1974, RICHARD W. STARK, RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi", and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, and aid, counsel and procure the burning of a building at 2701 S. MacDill Avenue, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.02 and 806.06, Florida statutes (1973).

(47) On or about July 24, 1975, ROSARIO PALERMO, JOSEPH J. CARTER, a/k/a "Joe", PAUL GUARINO, FRANK SCIONTI, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, by means of fire, damage, and aid, abet, counsel and procure the damaging by fire of a building at 316 E. Park Avenue, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.01(2), 817.233, and 777.011, Florida statutes (1974).

(48) On or about August 17, 1975, JOSEPH C. RUSSELLO, a/k/a "Joe", JOSEPH D. LAZZARA, a/k/a "Joe", JOSEPH J. CARTER, a/k/a "Joe", and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously set fire to, burn, cause to be burned, damage by fire, and aid, abet, counsel and procure the burning of a building at 4601 W. Kennedy Boulevard, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, con-

trary to Sections 806.02 and 806.06, Florida statutes (1973) and 806.01(2), 817.233 and 777.011, Florida statutes (1974).

(49) On or about August 17, 1975, JOSEPH D. LAZZARA, a/k/a "Joe", and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, by means of fire, damage and aid, abet, counsel and procure the damaging by fire of a vehicle, to-wit: a 1973 Ford Gran Torino station wagon, which vehicle was insured at that time against loss or damage by fire, with intent to defraud the insurer of that vehicle, contrary to Sections 806.01(2), 817.233, and 777.011, Florida statutes (1974).

(50) On or about August 17, 1975, JOHN ALAN HOLT, AMALIA MORGADO, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, by means of fire, damage and aid, abet, counsel and procure the damaging by fire of a vehicle, to-wit: a 1972 Pontiac Ventura automobile, which vehicle was insured at that time against loss or damage by fire, with intent to defraud the insurer of that vehicle, contrary to Sections 806.01(2), 817.233, and 777.011, Florida statutes (1974).

(51) On or about August 26, 1975, SAM C. MARTINO, BERTON B. CHASE, a/k/a "Bert", JOE GOMEZ, JOSEPH J. CARTER, a/k/a "Joe", RICHARD VICTOR ARRIGO, a/k/a "Vic Rossi", PAUL GUARINO, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, set fire to, burn, cause to be burned, damage by fire, and aid, abet, counsel and procure the burning of a building at 2510 Twelfth Street, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.02 and 806.06, Florida statutes

(1973) and 806.01(2), 817.233, and 777.011, Florida statutes (1974).

(52) On or about September 29, 1975, JOSEPH J. CARTER, a/k/a "Joe", and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, by means of fire, damage, and aid, abet, counsel and procure the damaging by fire of a building at 8422 Lopez Drive, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.01(2), 817.233, and 777.011, Florida statutes (1974).

(53) On or about October 27, 1975, JOSEPH J. CARTER, a/k/a "Joe", WILLIAM H. BROWN, a/k/a "Bill", PAUL GUARINO, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, by means of fire, damage, and aid, abet, counsel and procure the damaging by fire of a building at 3658 S. Westshore Boulevard, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.01(2), 817.233, and 777.011, Florida statutes (1974).

(54) On or about November 6, 1975, PAUL GUARINO and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, by means of fire, damage, and aid, abet, counsel and procure the damaging by fire of a building at 3012 Highland Avenue, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.01(2), 817.233, and 777.011, Florida statutes (1975).

(55) On or about March 27, 1976, JOHN THOMAS RIVERA, a/k/a "Johnny Rivera", "Scarface Rivera", and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, by means of fire, damage, and aid, abet, counsel and procure the damaging by fire of a building at 8909 N. Florida Avenue, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurer of that building, contrary to Sections 806.01(2), 817.233, and 777.011, Florida statutes (1975).

(56) On or about April 13, 1976, JOHN D. FISHER, ROBERT D. YOUNG, JOSEPH J. CARTER, a/k/a "Joe", JOHN ALAN HOLT, and WILLIE NORIEGA, a/k/a "Bill", did willfully and maliciously, by means of fire, damage, and aid, abet, counsel and procure the damaging by fire of a building at 1907-15 N. Armenia Avenue, Tampa, Florida, which building was insured at that time against loss or damage by fire, with intent to defraud the insurers of that building, contrary to Sections 806.01(2), 817.233, and 777.011, Florida statutes (1975).

6. *Forfeitures:*

(1) Through the aforesaid pattern of racketeering activity, on or about January 25, 1974, draft number F96052, drawn on the account of Jefferson Insurance Company of New York, was made payable and was paid to ROSARIO PALERMO and Broadway National Bank in the amount of $10,000.00 on an insurance policy issued to ROSARIO PALERMO for the premises located at 1811 Taliaferro Street, Tampa, Florida, of which PAUL GUARINO, JOE GOMEZ, and ROSARIO PALERMO, each received a one-

third share of said amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(2) Through the aforesaid pattern of racketeering activity, on or about May 2, 1974, draft number 41 544898, drawn on the account of Allstate Insurance Company, was made payable and was paid to Conjo, Inc., JOSEPH LAZZARA and his attorney, Frederick Joiner in the amount of $12,117.00 on an insurance policy issued to Conjo, Inc. for the premises located at 20410 Old Cutler Road, Miami, Florida, of which JOSEPH D. LAZZARA, a/k/a "Joe" received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(3) Through the aforesaid pattern of racketeering activity, on or about February 19, 1974, draft number 41 503378, drawn on the account of Allstate Insurance Company, was made payable and was paid to JOSEPH D. LAZZARA, a/k/a "Joe", Conjo, Inc., and First National Bank, Ft. Lauderdale, Florida, in the amount of $3,000.00, on an insurance policy issued to Conjo, Inc. as insured for the premises located at 20410 Old Cutler Road, Miami, Florida, of which JOSEPH D. LAZZARA, a/k/a "Joe" received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963 (a) & (c).

(4) Through the aforesaid pattern of racketeering activity, on or about February 7, 1974, draft number F-

94147, drawn on the account of Jefferson Insurance Company of New York, was made payable and was paid to Mr. and Mrs. Roland Rodriguez and Margaret Gonzalez in the amount of $3,000.00 on an insurance policy issued to Mr. and Mrs. Roland Rodriguez for the premises located at 2208 Tenth Street, Tampa, Florida, of which ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez", received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(5) Through the aforesaid pattern of racketeering activity, on or about February 7, 1974, draft number F-94145, drawn on the account of Jefferson Insurance Company of New York, was made payable and was paid to Mr. and Mrs. Roland Rodriguez and Margaret Gonzalez in the amount of $1,226.83 on an insurance policy issued to Mr. and Mrs. Roland Rodriguez for the premises located at 923 Twelfth Avenue, Tampa, Florida, of which ROLANDO GONZALEZ RODRIGUEZ, a/k/a "Roland Rodriguez", received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(6) Through the aforesaid pattern of racketeering activity, on or about June 27, 1974, draft number GF 79603, drawn on the account of Peninsular Fire Insurance Company, was made payable to Maria Farina, JIMMY FARINA, John S. Farina, and A. C. Martino, attorney at law, in the amount of $4,000.00 on an insurance policy issued to Maria Farina and the estate of J. A. Farina as

insureds for the premises located at 2917 and 2917-½ Twelfth Avenue, Tampa, Florida, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(7) Through the aforesaid pattern of racketeering activity, on or about April 15, 1974, draft number 3370200, drawn on the account of Sentry Insurance Company, was made payable to JOSEPH MACALUSO, Peter L. Spoto, Alice Spoto, and Ybor Loan Company, in the amount of $20,000.00 on an insurance policy issued to JOSEPH MACALUSO, a/k/a "Joe" for the premises located at 3006 North Nebraska Avenue, Tampa, Florida, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(8) Through the aforesaid pattern of racketeering activity, on or about April 15, 1974, draft number 3370201, drawn on the account of Sentry Insurance Company, was made payable to JOSEPH MACALUSO, in the amount of $3,000.00 on an insurance policy issued to JOSEPH MACALUSO, as insured for the premises located at 3006 North Nebraska Avenue, Tampa, Florida, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(9) Through the aforesaid pattern of racketeering activity, on or about May 3, 1974, draft number 65819, drawn on the account of Southeastern Fidelity Insurance Company, was made payable to Bill Noriega and Carol Noriega, SAM MARTINO and Ybor Loan Company and

Lena Ferlita in the amount of $7,894.74 on an insurance policy issued to WILLIE NORIEGA, a/k/a "Bill" as insured for the premises located at 2020 East Columbus Drive, Tampa, Florida, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963 (a) & (c).

(10) Through the aforesaid pattern of racketeering activity, on or about May 3, 1974, draft number 65818, drawn on the account of Southeastern Fidelity Insurance Company, was made payable to Bessie Williams and Carl G. Rassler, her attorney, and Bill Noriega and Carol Noriega, and Lena Ferlita and Ybor Loan Company and SAM MARTINO, in the amount of $4,210.53 on an insurance policy issued to WILLIE NORIEGA, a/k/a "Bill" as insured for the premises located at 2020 East Columbus Drive, Tampa, Florida, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963 (a) & (c).

(11) Through the aforesaid pattern of racketeering activity, on or about June 6, 1974, draft number 67133, drawn on the account of Southeastern Fidelity Insurance Company, was made payable to Bill and Carol Noriega and SAM MARTINO, in the amount of $7,105.77 on an insurance policy issued to WILLIE NORIEGA, a/k/a "Bill" as insured for the premises located at 2020 East Columbus Drive, Tampa, Florida, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(12) Through the aforesaid pattern of racketeering activity, on or about May 3, 1974, draft number F 4628, drawn on the account of Financial Fire & Casualty Company, was made payable to Bill Noriega and Carol Noriega, attorney Carl G. Rassler, Bessie Williams, Lena Ferlita, and Ybor Loan Company, in the amount of $7,894.73 on an insurance policy issued to WILLIE NORIEGA, a/k/a "Bill" for the premises located at 2020 East Columbus Drive, Tampa, Florida, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(13) Through the aforesaid pattern of racketeering activity, JOSEPH J. CARTER, a/k/a "Joe", received $3,000.00 of the proceeds heretofore enumerated in sub-paragraph (9) through (12) above, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(14) Through the aforesaid pattern of racketeering activity, SAM C. MARTINO received $2,500.00 from the proceeds enumerated in sub-paragraph (9) through (12) above, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(15) Through the aforesaid pattern of racketeering activity, PAUL GUARINO received $4,000.00 of the proceeds enumerated in sub-paragraph (9) through (12) above, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(16) Through the aforesaid pattern of racketeering activity, WILLIE NORIEGA, a/k/a "Bill" received $14,000.00 of the proceeds enumerated and set forth in subparagraph (9) through (12) above, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(17) Through the aforesaid pattern of racketeering activity, on or about March 25, 1976, draft number 23-64-15, drawn on the account of National Union Fire Insurance Company, was made payable and was paid to PAUL GUARINO and Michael L. Kinney in the amount of $10,000.00 on an insurance policy issued to PAUL GUARINO as insured for the premises located at 409 East Oak Street, Tampa, Florida, of which PAUL GUARINO received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(18) Through the aforesaid pattern of racketeering activity, on or about March 11, 1975, draft number 840317-373, on the account of Crum and Forster Insurance Companies, was made payable and was paid to All American Electric, Inc. and Rudy G. LaRussa, in the amount of $35,000.00 on an insurance policy issued to All American Electric, Inc. as insured for the premises located at 4509 West Alva Street, Tampa, Florida, of which MANUEL EUFEMIO FERNANDEZ, JR., received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(19) Through the aforesaid pattern of racketeering activity, on or about March 11, 1975, draft number 840317-

364, drawn on the account of Crum and Forester Insurance Companies, was made payable and paid to All American Electric, Inc. and Joseph Sacco and Rosalie Sacco, Electric Supply of Tampa, Inc., and Rudy G. LaRussa, in the amount of $40,000.00 on an insurance policy issued to All American Electric, Inc. as insured for the premises located at 4509 West Alva Street, Tampa, Florida, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(20) Through the aforesaid pattern of racketeering activity, on or about November 4, 1975, draft number B51974, drawn on the account of Cincinnati Financial Corporation, was made payable and paid unto JOSEPH C. RUSSELLO and Arline Russello, in the amount of $28,-852.66 on an insurance policy issued to JOSEPH C. RUSSELLO, Arline B. Russello, Charles A. Russello and Frances R. Russello, d/b/a JOSEPH C. RUSSELLO and Associates, as insureds for the premises located at 4601-29 West Kennedy Boulevard, Tampa, Florida, of which JOSEPH C. RUSSELLO received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(21) Through the aforesaid pattern of racketeering activity, on or about October 10, 1975, draft number B48927, drawn on the account of Cincinnati Financial Corporation, was made payable and paid to JOSEPH C. RUSSELLO and Pilot Life Insurance Company, in the amount of $161,190.43 on an insurance policy issued to JOSEPH C. RUSSELLO, Arline B. Russello, Charles A. Russello

and Frances R. Russello, d/b/a JOSEPH C. RUSSELLO and Associates, as insureds for the premises located at 4601-29 West Kennedy Boulevard, Tampa, Florida, of which JOSEPH C. RUSSELLO received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(22) Through the aforesaid pattern of racketeering activity, on or about September 19, 1975, draft number B45166, drawn on the account of Cincinnati Financial Corporation, was made payable and paid to JOSEPH RUSSELLO and Arline Russello and Pilot Life Insurance Company, in the amount of $75,000.00 on an insurance policy issued to JOSEPH C. RUSSELLO, Arline B. Russello, Charles A. Russello and Frances R. Russello, d/b/a JOSEPH C. RUSSELLO and Associates, as insureds for the premises located at 4601-29 West Kennedy Boulevard, Tampa, Florida, of which JOSEPH C. RUSSELLO received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(23) Through the aforesaid pattern of racketeering activity, on or about August 25, 1975, draft number B40023, drawn on the account of Cincinnati Financial Corporation, was made payable and paid to JOSEPH C. RUSSELLO and Pilot Life Insurance Company, in the amount of $75,000.00 on an insurance policy issued to JOSEPH C. RUSSELLO, Arline B. Russello, Charles A. Russello and Frances R. Russello, d/b/a JOSEPH C. RUSSELLO and Associates, as insureds for the premises located at 4601-29 West Kennedy Boulevard, Tampa, Florida, of which JO-

SEPH C. RUSSELLO received the entire amount, which said interest and property is subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(24) Through the aforesaid pattern of racketeering activity, JOSEPH C. RUSSELLO, a/k/a "Joe", maintained in violation of Title 18, United States Code, Section 1962, ownership interest and property rights in and to JOSEPH C. RUSSELLO, Associates, a Florida Corporation, which afforded a source of influence over the Enterprise herein described, and which said ownership interest and property rights are subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(25) Through the aforesaid pattern of racketeering activity, JOSEPH C. RUSSELLO, a/k/a "Joe", maintained in violation of Title 18, United States Code, Section 1962, ownership interest and property rights in and to the premises located at 4601 West Kennedy Boulevard, Tampa, Florida, being more particularly described as:

> Lot 14, Black 2, Hanan Park, revised unit number 1, Tampa, Florida, together with the buildings and any and all other improvements thereon situated and pertaining thereto.

which afforded a source of influence over the Enterprise herein described, and which said ownership interest and property rights are subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

(26) Through the aforesaid pattern of racketeering activity, SAM C. MARTINO, maintained in violation of

Title 18, United States Code, Section 1962, ownership interest and property rights in and to the following companies: SAM C. MARTINO Realty Brokerage Company, Ybor Loan Company and M & S Investment Corporation, all of Tampa, Florida, which afforded a source of influence over the Enterprise herein described, and which said ownership interest and property rights are subject to forfeiture to the United States under the provisions of Title 18, United States Code, Section 1963(a) & (c).

All of which was in violation of Sections 1962(c) and 2 of Title 18, United States Code.

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THE GRAND JURY FURTHER CHARGES:

COUNTS TWENTY-EIGHT & TWENTY-NINE

From in or about June, 1975, and continuing to on or about November 4, 1975, in the Middle District of Florida,

JOSEPH C. RUSSELLO, a/k/a "Joe",
JOSEPH D. LAZZARA, a/k/a "Joe",
JOSEPH J. CARTER, a/k/a "Joe",
AND
WILLIE NORIEGA, a/k/a "Bill",

defendants herein, and others both known and unknown unto the Grand Jury, did devise and intend to devise, a scheme and artifice to defraud and obtain money by means of false and fraudulent pretenses, representations and promises, from an insurance company, namely, Cincinnati Insurance Company, well knowing at the time that the pretenses, representations and promises, would be and were false when made; the scheme and artifice so devised and intended to be devised, being in substance as follows.

It was a part of the scheme and artifice to defraud and to obtain money from said insurance company by means of false and fraudulent pretenses, representations and promises, to-wit:

1. That JOSEPH C. RUSSELLO, a/k/a "Joe", had a financial interest in the property located at 4601 West Kennedy Boulevard, Tampa, Florida.

2. That JOSEPH C. RUSSELLO, a/k/a "Joe", d/b/a Joseph C. Russello & Associates, was a named insured in an insurance policy issued by the Cincinnati Insurance Company insuring the premises at 4601 West Kennedy Boulevard, against fire loss in the amount of $925,000.00 on the building and $7,500.00 on contents.

3. That JOSEPH C. RUSSELLO, a/k/a "Joe", JOSEPH D. LAZZARA, a/k/a "Joe", JOSEPH J. CARTER, a/k/a "Joe", and WILLIE NORIEGA, a/k/a "Bill", agreed to burn the premises at 4601 West Kennedy Boulevard, in order to fraudulently obtain money from said Cincinnati Insurance Company, relating to its aforementioned fire insurance coverage.

4. That on or about August 17, 1975, WILLIE NORIEGA, a/k/a "Bill", wilifully started a fire at the premises located at 4601 West Kennedy Boulevard.

5. That on or about August 20, 1975, JOSEPH C. RUSSELLO, a/k/a "Joe", submitted a signed and sworn partial Proof of Loss statement form to JOSEPH J. CARTER, a/k/a "Joe", in substantiation of a fraudulent claim, stating therein that the fire loss at 4601 West Kennedy Boulevard did not originate by any act, design, or procurement on his part, when, in truth and fact, as JOSEPH C. RUSSELLO, a/k/a "Joe", JOSEPH D. LAZ-

ZARA, a/k/a "Joe", JOSEPH J. CARTER, a/k/a "Joe", and WILLIE NORIEGA, a/k/a "Bill", then well knew, the premises had been damaged by arson on or about August 17, 1975, in furtherance and as part of the scheme devised by JOSEPH C. RUSSELLO, a/k/a "Joe", JOSEPH D. LAZZARA, a/k/a "Joe", JOSEPH J. CARTER, a/k/a "Joe", and WILLIE NORIEGA, a/k/a "Bill", to fraudulently obtain money from said insurer, the Cincinnati Insurance Company.

6. That on or about the dates listed below, in the Middle District of Florida, and elsewhere, JOSEPH C. RUSSELLO, a/k/a "Joe", JOSEPH D. LAZZARA, a/k/a "Joe" JOSEPH J. CARTER, a/k/a "Joe", and WILLIE NORIEGA, a/k/a "Bill", defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and obtain money by making false and fraudulent pretenses, representations and promises, did knowingly place and cause to be placed envelopes containing certain matters and things listed below in an authorized depository for mail matter to be sent and delivered according to the directions thereon by the Postal Service of the United States, each mailing being a separate count of this Indictment:

COUNT TWENTY-EIGHT

Sender:	Joseph J. Carter Carter and Larson, Adjusters Tampa, Florida
Addressee:	Cincinnati Insurance Company Cincinnati, Ohio
Date:	On or about August 21, 1975
Contents:	Property adjuster's first report with enclosed sworn partial Proof of Loss statement.

COUNT TWENTY-NINE

Sender: Cincinnati Insurance Company
Cincinnati, Ohio

Addressee: Poe and Associates, Inc.
Tampa, Florida

Date: On or about October 10, 1975

Contents: Draft number B48927 made payable to Joseph C. Russello and Pilot Life Insurance Company in the amount of $161,190.43.

All in violation of Sections 1341 and 2, Title 18, United States Code.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA — TAMPA

Docket No. 77-00083-Cr-T-H
Andrew Minyo, Acting Clerk

UNITED STATES OF AMERICA

vs.

JOSEPH C. RUSSELLO
a/k/a JOE

(Filed at Tampa, Fla. July 27, 1982)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—April 7, 1978.

COUNSEL—

____ WITHOUT COUNSEL—However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

× WITH COUNSEL—Raymond LaPorte.

PLEA—

____ GUILTY, and the court being satisfied that there is a factual basis for the plea,

____ NOLO CONTENDERE, × NOT GUILTY.

FINDING & JUDGMENT—

There being a verdict of

____ NOT GUILTY. Defendant is discharged

× GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully and knowingly conspiring with persons to commit an offense against the United States, that is: to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity, participation in the conduct of these affairs, and mail fraud; all in violation of Sections 1962(d), 1962(c), 2, and 1341, Title 18, United States Code, as charged in Counts 1, 2, 28, and 29 of the indictment.

SENTENCE OR PROBATION ORDER—

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) years as to Counts 1 and 2, concurrently, and Five (5) years as to Counts 28 and 29, concurrently with each other and with counts 1 and 2, all pursuant to Title 18, United States Code, Section 4205(b)(2). Execution of the sentence is deferred for Fifteen days and thereafter until such time as the defendant is notified by the United States Marshal as to when, where and to whom he should report to begin serving such sentence

U. S. MARSHALS
April 11, 1978, 9:37 a.m.
TAMPA or C.
MIDDLE DISTRICT OF FLA.

SPECIAL CONDITIONS OF PROBATION—

ADDITIONAL CONDITIONS OF PROBATION—

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of

probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION—
The court orders commitment to the custody of the Attorney General and recommends,

SIGNED BY—

× U. S. District Judge

_____ U. S. Magistrate

/s/ WM. TERRELL HODGES
Date—April 7, 1978.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

Certified as a True Copy on
This Date_____

By X. Henry

(__) Clerk
(×) Deputy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 77-83-CR-T-H

Microfilmed—Roll No. 73

UNITED STATES OF AMERICA

vs.

JOSEPH J. CARTER, et al

(Filed February 28, 1978)

SPECIAL VERDICT

We, the Jury, unanimously find beyond a reasonable doubt that the defendant, JOSEPH C. RUSSELLO, acquired $75,000.00 from an insurance policy on the premises located at 4601-29 West Kennedy Boulevard, Tampa, Florida, the proceed of draft number B40023, drawn on the account of Cincinnati Financial Corporation on or about August 25, 1975, as set forth in Count Two of the Indictment, item (13) under subsection 6 entitled *"Forfeitures"* thereof, and we hereby declare the same to be an interest and property forfeited to the United States.

YES ✓

NO_____

So Say We All,

/s/ James R. Adkins
Jury Foreman

Dated at Tampa, Florida, this 28th day of February, 1978.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 77-83-CR-T-H

Microfilmed—Roll No. 73

UNITED STATES OF AMERICA

vs.

JOSEPH J. CARTER, et al

(Filed February 28, 1978)

SPECIAL VERDICT

We, the Jury, unanimously find beyond a reasonable doubt that the defendant, JOSEPH C. RUSSELLO, acquired $75,000.00 from an insurance policy on the premises located at 4601-29 West Kennedy Boulevard, Tampa, Florida, the proceed of draft number B45166, drawn on the account of Cincinnati Financial Corporation on or about September 19, 1975, as set forth in Count Two of the Indictment, item (12) under subsection 6 entitled *"Forfeitures"* thereof, and we hereby declare the same to be an interest and property forfeited to the United States.

YES ✓

NO_____

So Say We All,

/s/ James R. Adkins
Jury Foreman

Dated at Tampa, Florida, this 28th day of February, 1978.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 77-83-CR-T-H

Microfilmed—Roll No. 73

UNITED STATES OF AMERICA

vs.

JOSEPH J. CARTER, et al

(Filed February 28, 1978)

SPECIAL VERDICT

We, the Jury, unanimously find beyond a reasonable doubt that the defendant, JOSEPH C. RUSSELLO, acquired $161,190.43 from an insurance policy on the premises located at 4601-29 West Kennedy Boulevard, Tampa, Florida, the proceed of draft number B48927, drawn on the account of Cincinnati Financial Corporation on or about October 10, 1975, as set forth in Count Two of the Indictment, item (11) under subsection 6 entitled *"Forfeitures"* thereof, and we hereby declare the same to be an interest and property forfeited to the United States.

YES ✓

NO_____

So Say We All,

/s/ James R. Adkins
Jury Foreman

Dated at Tampa, Florida, this 28th day of February, 1978.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 77-83-CR-T-H

Microfilmed—Roll No. 73

UNITED STATES OF AMERICA

vs.

JOSEPH J. CARTER, et al

(Filed February 28, 1978)

SPECIAL VERDICT

We, the Jury, unanimously find beyond a reasonable doubt that the defendant, JOSEPH C. RUSSELLO, acquired $28,852.66 from an insurance policy on the premises located at 4601-29 West Kennedy Boulevard, Tampa, Florida, the proceed of draft number B51974, drawn on the account of Cincinnati Financial Corporation on or about November 4, 1975, as set forth in Count Two of the Indictment, item (10) under subsection 6 entitled *"Forfeitures"* thereof, and we hereby declare the same to be an interest and property forfeited to the United States.

YES ✓

NO_____

So Say We All,

/s/ James R. Adkins
Jury Foreman

Dated at Tampa, Florida, this 28th day of February, 1978.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 77-83 CR-T-H

Microfilmed—Roll No. 75

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL GUARINO, ROLANDO GONZALEZ RODRIGUEZ, JOSEPH C. RUSSELLO, and SAM C. MARTINO,

Defendants.

(Filed November 17, 1978)

ORDER AND JUDGMENT OF FORFEITURE

On February 24, 1978, the Defendants PAUL GUARINO, ROLANDO GONZALEZ RODRIGUEZ, JOSEPH C. RUSSELLO and SAM C. MARTINO were convicted by a jury of a violation of 18 USC § 1962(c). On February 28, 1978, the same jury returned special verdicts against each of those defendants declaring certain interests and properties held by them to be forfeited to the United States under the provisions of 18 USC § 1963. Upon receipt of those special verdicts the Court requested the submission of memoranda on behalf of all parties concerning the procedures to be followed in enforcing the special verdicts of forfeiture. Having considered the memoranda of counsel, it is hereby

ORDERED:

1. As to the Defendant PAUL GUARINO, that the amount of $4,000 is hereby forfeited and that judgment in

the sum of $4,000 is hereby granted in favor of the United States of America and against the Defendant PAUL GUARINO, for which let execution issue.

2. As to the Defendant ROLANDO GONZALEZ RODRIGUEZ, that the amounts of $3,000 and $1,226.83 are hereby forfeited and that judgment in the sum of $4,226.83 is hereby granted in favor of the United States of America and against the Defendant ROLANDO GONZALEZ RODRIGUEZ, for which let execution issue.

3. As to the Defendant JOSEPH C. RUSSELLO, that the amounts of $28,852.66, $161,190.43, $75,000.00 and $75,000.00 are hereby forfeited and that judgment in the sum of $340,043.09 is hereby granted in favor of the United States of America and against the Defendant JOSEPH C. RUSSELLO, for which let execution issue.

4. As to the Defendant SAM C. MARTINO, that the amount of $2,500 is hereby forfeited and that judgment in the sum of $2,500 is hereby granted in favor of the United States of America and against the Defendant SAM C. MARTINO, for which let execution issue.

5. As to the Defendant SAM C. MARTINO, that any and all ownership interest and property rights which he has maintained in and to Ybor Loan Company are hereby forfeited and that the Defendant SAM C. MARTINO is hereby directed to transfer to the United States of America and deliver to the United States Marshal for seizure by the Attorney General any and all certificates, documents, or other proof of ownership interests and property rights which he has maintained in and to Ybor Loan Company, including but not limited to certificates of stock in that corporation.

6. As to the Defendant SAM C. MARTINO, that any and all ownership interests and property rights which he has maintained in and to M & S Investment Corporation are hereby forfeited and that the Defendant SAM C. MARTINO is hereby directed to transfer to the United States of America and deliver to the United States Marshal fo[illegible]izure by the Attorney General any and all certificates, documents or other proof of ownership interests and property rights which he has maintained in and to M & S Investment Corporation, including but not limited to certificates of stock in that corporation.

7. That the Defendants GUARINO, RODRIGUEZ, RUSSELLO and MARTINO shall have thirty (30) days from the date of this Order to attempt to obtain a stay of its provisions. Absent a grant of a stay by the United States Court of Appeals for the Fifth Circuit within that period, the forfeitures ordered herein will take immediate effect upon the expiration of that time.

DONE and ORDERED at Tampa, Florida, this 17th day of November, 1978.

Wm. Terrell Hodges
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 77-83 Cr. T. H.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH C. RUSSELLO, et al.,

Defendants.

(Filed November 27, 1978)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that JOSEPH C. RUSSELLO, Defendant in the above styled cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit, from an Order and Judgment of Forfeiture entered in this cause on the 17th day of November, 1978.

Respectfully submitted,

/s/ Raymond E. LaPorte
408 Madison Street
Tampa, Florida 33602
(813) 229-1891

Attorney for Defendant,
Joseph C. Russello

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by delivery, to the Honorable Bill James, Assistant United States Attorney, Post Office Box 2841, Tampa, FL 33601 on this the 27th day of November, 1978.

/s/ Raymond E. LaPorte, Attorney

UNITED STATES of America,

Plaintiff-Appellee,

vs.

Sam C. MARTINO, Joseph C. Russello and Rolando Gonzalez Rodriquez,

Defendants-Appellants.

UNITED STATES of America,

Plaintiff-Appellee,

vs.

John Alan HOLT, Rosario Palermo, William H. Brown, a/k/a Bill, John D. Fisher, Robert D. Young, Joseph Macaluso, a/k/a Joe, Frank Scionti, John Nicholas Lostracco, Sam C. Martino, Paul Guarino, Jimmy Farina, Berton B. Chase, a/k/a Bert, Rolando Gonzalez Rodriguez, a/k/a Roland Rodriguez, Joseph D. Lazzara, a/k/a Joe, Joseph C. Russello, a/k/a Joe and Amalia Morgado,

DefendantsAppellants.

UNITED STATES of America,

Plaintiff-Appellee,

vs.

Sam C. MARTINO,

Defendant-Appellant.

Nos. 78-3611, 78-5260 and 79-2606.

United States Court of Appeals, Fifth Circuit.

June 19, 1981.

(Redacted to Forfeiture)

Sixteen defendants appealed from a combined total of 80 convictions rendered in the United States District Court for the Middle District of Florida, at Tampa, Wm.

Terrell Hodges, J., for mail fraud and violations of Racketeer Influenced and Corrupt Organizations Act arising out of arson ring. The Court of Appeals, Politz, Circuit Judge, held that: (1) RICO is constitutional; (2) indictment was sufficient, not duplicitous, did not misapply RICO, and there was no variance affecting defendants' substantial rights; (3) prosecution for substantive and conspiracy violations of RICO did not violate double jeopardy clause; (4) there was no abuse of discretion in denial of motion for bill of particulars; (5) there were no *Brady* violations mandating reversal; (6) trial judge was not obligated to ask court-appointed expert to determine government witness' mental capacity at time of alleged offenses; (7) trial judge did not abuse his discretion in denying repeated motions for severance; (8) Government did not violate Jencks Act; (9) prosecutor's referring to witness' participation in federal witness protection program was not unfair exploitation; (10) comment made by counsel for one defendant was harmless; (11) one defense counsel's comment on his client's decision to testify was not an improper reference to other defendants' decisions not to testify; (12) trial judge's refusal to strike government witness' responses was not erroneous; (13) trial judge did not abuse his discretion in ruling key government witness competent to testify; (14) court properly admitted plea bargain agreement of government's key witness; (15) witness' reference to his willingness to take lie detector test was not prejudicial; (16) there was no reversible error reference to defendants' election not to testify; (17) there was no error in trial judge's allowing breaks in sequestration; (18) one defendant was not deprived of his right to unbiased grand jury; (19) there

was no error in exclusion of testimony of government witness' threats against employer of one defense witness; (20) trial judge correctly charged jury as to evidence required for mail fraud conviction; (21) evidence was sufficient to support convictions except on two counts of mail fraud, one count of conspiracy to violate RICO and two other RICO counts; (22) trial judge did not abuse his discretion in denying motion for new trial based on newly discovered evidence; (23) insurance proceeds received by certain defendants from burning of their properties were not subject to forfeiture; and (24) one defendant's interest in two companies were subject to forfeiture.

Convictions affirmed in part and reversed in part, denial of motion for new trial affirmed, and orders of monetary forfeiture reversed in part and affirmed in part.

FORFEITURE

Docket Number 78-3611

[112] The jury returned verdicts ordering the forfeiture of insurance proceeds collected by defendants Russello, Rodriguez, Martino and Guarino. Martino, Russello and Rodriguez appealed the forfeiture orders; Guarino did not.[19] The issue, one of first impression in this court, is whether the term "interest" in 18 U. S. C. § 1963(a) includes income or receipts from racketeering activity.

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19. Guarino belatedly raises the issue in his brief on appeal of his conviction. This is not sufficient to vest appellate jurisdiction. The order of forfeiture is a different judgment from the sentence and commitment order. A separate notice of appeal was required.

Under 18 U. S. C. § 1963(a), a defendant convicted of violating RICO must:

> forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

Rodriguez was ordered to forfeit $4,226.83, Russello's forfeiture was for $340,043.09, and Martino was ordered to forfeit $2,500 together with his ownership, interest and property rights in two companies, Ybor Loan Company and M & S Investment Corporation. The appellants' challenges to the forfeiture orders center on the definition of "interest" as used, but not defined, in the statute. The government takes the position that income or profits from an illegal enterprise are forfeitable under § 1963; appellants contend that § 1963 applies only to an interest in an enterprise. Appellants' position is supported by decisions of other courts.

In *United States v. Meyers*, 432 F. Supp. 456, 461 (W. D. Pa. 1977), the court indicated that it would be a "strained construction of Section 1963" to classify profits or fruits received from the enterprise as "interest" in the enterprise or as a claim or right that could afford a source of influence over the enterprise. The court went on to note that "the more natural interpretation is that an 'interest' is akin to a continuing proprietary right in the nature of partnership or stock ownership (or holding a debt or claim, as distinguished from 'equity' investment) rather than mere dividends or distributed profits."

Id. This interpretation was approved by the court in *United States v. Thevis,* 474 F. Supp. 134, 142 (N. D. Ga. 1979), which held that "the limits of forfeiture authorized by 18 U. S. C. § 1963 do not embrace fruits or profits derived from the operation of a § 1962 enterprise." Several factors were considered by the court in reaching that conclusion. The different treatment Congress accorded income and interest was noted—§ 1962(a) makes it illegal to invest income derived from racketeering activity in the acquisition of an interest in an enterprise. Congress recognized that income and profits could be generated by racketeering activity but it chose to include in the forfeiture provision only the interest acquired or held and not the income of an enterprise. The *Thevis* opinion also recognized that the "enterprise" concept is the basis of § 1962 and that the forfeiture provision is directed toward an interest acquired or maintained "in violation of Section 1962." Thus the existence of the enterprise is also a cornerstone of § 1963. The court was convinced that the use of the word "interest" was limited to interest in the enterprise. Our colleagues of the Ninth Circuit, in a well-reasoned opinion, recently held that § 1963 applies to interest "in an enterprise" and not to any form of income or proceeds derived from a pattern of racketeering activity. *United States v. Marubeni America Corp.,* 611 F. 2d 763 (9th Cir. 1980).

In reaching our conclusion we are impressed by several considerations. In enacting 18 U. S. C. § 1963, Congress permitted *in personam* forfeitures that had previously been prohibited by 18 U. S. C. § 3563. Viewed in that perspective one would expect that Congress would strictly limit forfeitures. In this instance the limitation

would be to the defendant's interest in the enterprise he had corrupted. Such an intent was indicated by the comments of Deputy Attorney General Richard P. Kleindienst before the Senate Subcommittee on Criminal Laws and Procedures when he said:

> It is felt that this revival of the concept of forfeiture as a criminal penalty *limited as it is in* § 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than of Constitutional power . . . . (Emphasis in original.)

Forfeiture under 18 U. S. C. § 1963—RICO's Most Powerful Weapon, 17 Am. Crim. L. Rev. 379, 385 (1980), *quoting* Measures Relating to Organized Crime, Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 66 (1969). Furthermore, had Congress intended to include fruits and profits, it could have specifically provided for such as it did in the Comprehensive Drug Abuse Prevention and Control Act of 1970, passed by the same Congress in the same month as RICO. 21 U. S. C. § 848(a) (2) states: "Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—(A) *the profits* obtained by him in such enterprise . . . . " (Emphasis added.)

[113] We are convinced Congress did not intend to include in the forfeiture provision of § 1963 the fruits and profits obtained from a pattern of racketeering activity. We are aware this holding occasions problems with respect to associations in which one cannot own a

legal interest, as in the case *sub judice*. This limitation was recognized by the Justice Department when it stated that "there is often nothing to forfeit . . . in the case of individuals associated in fact." *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon, supra* at 391, *quoting* U.S. Department of Justice, Explanation of the Racketeer Influenced and Corrupt Organization Statute 2 (4th ed.). The kind of enterprise will, therefore, be critical in the determination of forfeitable interests.

[114] Having concluded that only interests in an enterprise are subject to forfeiture, we reverse the monetary forfeiture orders against Russello, Rodriguez and Martino. The insurance proceeds they received from the burning of their properties were proceeds or profits from the enterprise; the proceeds did not constitute "interest in an enterprise."

[115] We affirm the order of forfeiture of Martino's interest in his two companies because it falls squarely within the language of § 1963(a) (2) which provides for the forfeiture of any interest affording a source of influence over the enterprise. Both of Martino's companies were active in the enterprise. They provided funds for the arson and fraud ventures. The M & S Investment Corporation purchased property with the intent to burn it, but sold the property to someone else who then burned it. Martino was an active participant; he played an important role within the enterprise, a role made even more effective because of the companies he managed. The Act requires forfeiture of his intrest in these companies.

The orders of monetary forfeiture entered against Martino, Russello and Rodriguez are REVERSED. The order of forfeiture of Matino's interest in Ybor Loan Company and M & S Investment Corporation is AFFIRMED.

APPENDIX

As noted below, some fires were listed only as overt acts and/or acts of racketeering in Counts 1 and 2 while others were also the subjects of mail fraud counts (Counts 3 through 35). We list only those fires that are at the core of the convictions appealed. All addresses are in Tampa, Florida, unless otherwise indicated.

1. 1202 E. Buffalo Avenue, a bakery (Counts 1 and 2)—Guarino and Scionti burned the premises with the help of two other arsonists who died as a result of the fire.

2. 3401 24th Street (Counts 1 and 2)—Guarino, Noriega and Scionti burned a frame house owned by Scionti in his brother's name. Scionti received a $4,000 settlement on the insurance policy.

3. 1811 Taliaferro Street (Counts 1, 2, 3 and 4)—Guarino, Noriega and Scionti burned a frame house belonging to Palermo and Guarino (silent partner). This house was burned twice; insurance proceeds were collected by Palermo both times. The first time he collected on a policy transferred to him when he bought the house. After the first fire, he made cosmetic repairs to the house and obtained insurance coverage through a different agency. After the second fire, he collected the full face value of this policy, $10,000.

4. 20410 Old Cutler Road, Miami (Counts 1, 2, 5 and 6) —Guarino, Scionti and Noriega burned a laundromat belonging to Lazzara. Lazzara received only $15,117 although he submitted a claim for $40,000.

5. 2208 10th Street and 923 12th Avenue (Counts 1, 2 7 and 8)—Guarino, Noriego and Macaluso burned two adjacent frame buildings owned by Rodriguez. $4,226.83 was collected by Rodriguez through the help of Carter.

6. 2917-2917½ 20th Avenue (Counts 1, 2, 9 and 10)— Noriega and Guarino burned a frame house owned by Farina in his mother's name. Farina received $4,000 in insurance proceeds.

7. 3006 N. Nebraska Avenue (Counts 1, 2, 11, 12 and 13) —Macaluso bought a house from Noriega and had Guarino and Noriega burn it. With help from Carter, $23,000 in insurance proceeds was paid to Macaluso.

8. 2020 E. Columbus Drive (Counts 1, 2, 14, 15 and 16) —Noriega and Guarino burned a frame house acquired by Noriega through the assistance of Martino. With the help of Carter, $20,000 was paid on three different insurance policies, two purchased by Noriega and one transferred to him by the prior owner. The property was later burned again by Noriega and he collected an additional $7,105.77.

9. 2510 12th Street (Counts 1 and 2)—Martino purchased an option on a warehouse with the intent to insure it and then burn it. Necessary repairs were made in order to obtain insurance. Guarino and Noriega then bought the option from Martino and

put it in the name of Alex Fekete who exercised the option. An office was set up in the warehouse and a $50,000 insurance policy was obtained (in addition to the $30,000 policy transferred from the previous owner who retained a mortgage position for the credit portion of the sale). When more money was needed to cover repairs, Chase got a loan from a client who was given a second mortgage. Noriega burned the property. Fekete had allowed the additional insurance to lapse by failing to pay the premiums. The insurance recovery on the original insurance was paid to the first mortgage holder.

10. 2114 27th Street (Counts 1, 2, 17 and 18)—Fekete and Noriega burned an apartment owned by a relative of Lostracco (co-worker of Martino in his real estate business). A transfer of the property from Lostracco's brother-in-law to Jimmy Traina (straw man for Noriega and Guarino) was attempted but was not completed before the property was burned. The $4,500 in insurance proceeds was initially paid to Lostracco's brother-in-law, but was later delivered over to Noriega, Guarino and Arrigo.

11. 409 E. Oak Street (Counts 1, 2, 19 and 20)—Guarino and Noriega burned a two-story frame house owned by Guarino. The house had been "placarded" by city housing inspectors prior to the fire. Cosmetic repairs were made to the exterior of the house and with Carter's guidance, insurance was obtained. Following the fire the insurance company refused to pay the face value of the policy. Carter intervened and arranged for a $10,000 settlement.

12. 3310 Vasconia Street (Counts 1, 2, 21 and 22)—Noriega and Arrigo burned a house owned by Holt.

Morgado had made the necessary arrangements for Holt. When Holt acquired the property he transferred the existing policy and obtained additional coverage. The first attempt at burning the house was unsuccessful; in the second attempt the building was totally destroyed. Holt claimed $41,501.55 under one policy and $36,501.55 under another.

13. 4601 W. Kennedy Boulevard (Counts 1, 2, 28 and 29)—Noriega and Traina set fire to the Central Professional Building owned by Russello. Insurance coverage on the premises paid $340,043.09 through adjustments made by Carter.

14. 3012 Highland Avenue (Counts 1 and 2)—Guarino and Noriega attempted to burn a frame apartment building owned by an acquaintance of Guarino. The fire was spotted by neighbors and extinguished prior to extensive damage.

15. 3658 S. Westshore Boulevard (Counts 1, 2, 31 and 33)—Noriega burned a True Value Hardware Store owned by Bill Brown. Prior to the fire, Brown had obtained $175,000 in additional insurance with the help of Carter. The fire was only partially successful, and though Brown claimed damages of over $100,000, the insurance company estimated the damages at only $15,000 and refused to pay the claim.

16. 1907-1915 N. Armenia Avenue (Counts 1, 2, 32 and 33)—This property was acquired by Fisher and Young through arrangements made by Noriega. After superficial repairs were made, insurance coverage was obtained. The building was heavily damaged by fire and $125,000 was collected from the insurance company.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 78-3611

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SAM C. MARTINO, JOSEPH C. RUSSELLO, and ROLANDO GONZALEZ RODRIGUEZ,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 19, 1981, 5 Cir., 1981 —, 648 F. 2d 367).

(October 14, 1981)

Before GODBOLD, Chief Judge, BROWN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, and WILLIAMS, Circuit Judges.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. That portion of the Court's consolidated opinion of June 19, 1981, covering this appeal is vacated.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
October 14, 1981

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130
Zip Code—70130-3479

TO ALL COUNSEL OF RECORD:

No. 78-3611 — U. S. A. v. Martino, Et Al.

Dear Counsel:

Enclosed is an order entered this day on the Court's own motion directing that this cause be reheard en banc with oral argument.

While the entire appeal from the Order and Judgment of Forfeiture is being reopened, the En Banc Court is principally concerned with the question of whether insurance proceeds are subject to forfeiture under the Forfeiture Provisions of the RICO statute. Under Fifth Circuit Local Rule 17, the panel's opinion in this cause beginning on Slip Page 8274 has been vacated along with the judgment entered thereon.

Pursuant to the Court's direction for the Clerk to specify a briefing schedule for the filing of supplemental briefs, appellants will have until November 10, 1981, for filing their supplemental brief, with appellee's supplemental brief to be filed in this office not later than December 5, 1981. THE SUPPLEMENTAL BRIEFS

MUST BE ON FILE IN THE CLERK'S OFFICE BY THE SPECIFIED DATES ABOVE BECAUSE THE CASE WILL BE ARGUED DURING THE WEEK OF JANUARY 11, 1982.

All parties are requested to furnish thirty (30) copies of their supplemental briefs and *opening briefs* previously filed, for the use of the en banc court.

Very truly yours,

/s/ GILBERT F. GANUCHEAU
Gilbert F. Ganucheau
Clerk

GFG/jmg
Enclosure

Mr. B. Frank Winkles
Mr. Raymond E. LaPorte
Mr. Peter N. Macaluso
Ms. Eleanor J. Hill
Ms. Sara Criscitelli

cc: Hon. William Terrell Hodges

UNITED STATES of America,

Plaintiff-Appellee,

v.

Sam C. MARTINO, Joseph C. Russello and Rolano Gonzalez Rodriguez,

Defendants-Appellants.

No. 78-3611.

United States Court of Appeals, Fifth Circuit.*

Aug. 2, 1982

Appeal was taken from a judgment of the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., directing the forfeiture of moneys received by defendants as insurance payments in an insurance fraud scheme. In a panel opinion, the Court of Appeals, Politz, Circuit Judge, 648 F. 2d 367, certiorari denied, — U. S. —, 102 S. Ct. 2020, 72 L. Ed. 2d 474, reversed. Rehearing en banc was granted. The Court of Appeals, James C. Hill, Circuit Judge, held that insurance proceeds obtained through conduct of arson ring were subject to forfeiture under criminal forfeiture provisions of racketeer influenced and corrupt organizations statute.

Affirmed; remanded.

Politz, Circuit Judge, dissented and filed opinion in which Alvin B. Rubin, Tate, Thomas A. Clark, Jerre S. Williams, and Garwood, Circuit Judges, joined.

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*Former Fifth Circuit case, section 9(1) of Public Law 96-452, October 14, 1980.

1. Statutes — 188

In absence of clearly expressed legislative intention to contrary, plain language of statute controls its construction.

2. Forfeitures — 3

Term "interest" as used in criminal forfeiture provision of racketeer influenced and corrupt organizations statute includes income or profit derived from pattern of racketeering activity and is not limited to interests in in enterprise. 18 U. S. C. A. §§ 1961-1968, 1963(a) (1).

See publication Words and Phrases for other judicial constructions and definitions.

3. Forfeitures — 3

Insurance proceeds obtained through conduct of arson ring were subject to forfeiture under criminal forfeiture provisions of racketeer influenced and corrupt organizations statute. 18 U. S. C. A. §§ 1961-1968, 1963(a) (1).

D. Frank Winkles, Tampa, Fla., for Martino.

Raymond E. LaPorte, Tampa, Fla., for Russello.

Peter N. Macaluso, Tampa, Fla., for Rodriguez.

Eleanor J. Hill, Sp. Atty., Dept. of Justice, Tampa, Fla., Sara Criscitelli, Dept. of Justice, Washington, D. C., for the U. S.

William W. Taylor, III, Washington, D. C., for amicus curiae.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges.**

JAMES C. HILL, Circuit Judge:

We granted rehearing en banc in this case to decide whether the term "interest" as used in 18 U. S. C. § 1963 (a) (1), the Criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations statute (RICO), 18 U. S. C. §§ 1961-1968[1], includes income or profits derived from a pattern of racketeering activity. Specifically at issue in this case is the forfeitability of insurance proceeds obtained through the conduct of an arson ring. The district court resolved this question of statutory construction in the government's favor. On appeal a panel of this court reversed the monetary forfeiture orders.[2] We now affirm the decision reached by the trial court.

**Judge Reynaldo G. Garza was a member of the en banc court under 28 U. S. C. A. 46(c) and participated in the oral argument of the case en banc. Subsequently, the Omnibus Judgeship Bill, Public Law 95-486 (95th Congress) was approved October 20, 1978. In view of this, Judge Garza does not participate in this decision.

[1]RICO constitutes Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970).

[2]*United States v. Martino*, 648 F. 2d 367, 407-09 (5th Cir. 1981), *vacated in part on other grounds sub nom. United States v. Holt*, 650 F. 2d 651 (5th Cir. 1981) (conviction of defendant Holt mooted by his death). The panel's discussion of the forfeiture issue was not printed in the federal reporter due to our grant of rehearing en banc. That section appears in full in the advance sheets, slip op. at 8274-76 (5th Cir. June 19, 1981).

I.

The facts surrounding the indictment, prosecution, and conviction of the various defendants are set out in detail in the panel opinion, 648 F. 2d at 378-80, 409-11 app. Briefly, the evidence showed that a group of individuals associated for the purpose of committing arson with the intent to defraud insurance companies. This association in fact enterprise,[3] composed of an insurance adjuster, homeowners, promoters, investors, and arsonists, operated to destroy at least eighteen residential and commercial properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows:

> At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds.

Id. at 380. These activities formed the basis for an indictment charging twenty-three defendants with mail fraud,[4] conspiring to violate RICO,[5] and substantive RICO violations.[6] Following a jury trial sixteen defendants were found guilty and sentenced to varying terms of imprisonment.[7] Pursuant to Federal Rule of Criminal Procedure

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[3] 18 U. S. C. § 1961(4) (1976).

[4] 18 U. S. C. § 1341 (1976).

[5] 18 U. S. C. § 1962(d) (1976).

[6] 18 U. S. C. § 1962(c) (1976).

[7] 648 F. 2d at 379 n. 1.

31(e),[8] the forfeiture question was then submitted to the jury for its special verdict on the extent of the interest or property subject to forfeiture. The jury ordered four defendants to forfeit monies received as insurance payments upon the successful burning of their properties: Paul Guarino—$4,000.00; Sam C. Martino—$2,500.00;[9] Rolando G. Rodriguez—$4,266.83; and Joseph C. Russello —$340,043.69. Concluding that § 1963(a)(1) was intended to reach only interests in an enterprise and not the profits or income from racketeering activity, the panel reversed these monetary forfeitures. 648 F. 2d at 409.[10]

II.

A.

[1] Resolution of this issue of statutory construction must begin with an analysis of the language of the statute itself. *Bread Political Action Committee v. Federal Election Commission*, — U. S. —, —, 102 S. Ct. 1235, 1237, 71 L. Ed. 2d 432 (1982) (quoting *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U. S. 176, 187, 100 S. Ct. 2601, 2608, 65 L. Ed. 2d 696 (1980)). In the absence of "a clearly ex-

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[8]That rule provides: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."

[9]Defendant Martino was also ordered to forfeit his ownership interests in two companies, Ybor Loan Company and M & S Investment Corporation. Both of these companies provided funds for the arson and fraud schemes. The panel affirmed the forfeiture of these interests, 648 F. 2d at 409. The propriety of this aspect of the forfeiture order has not been questioned on this rehearing.

[10]This reversal did not affect the forfeiture order against defendant Guarino, as he did not file a notice of appeal from that order. 648 F. 2d at 407 n. 19.

pressed legislative intention to the contrary," the plain language of the statute controls its construction. — U. S. —, 102 S. Ct. at 1238 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania,* 447 U. S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980)). Under 18 U. S. C. § 1963(a), a defendant who

> violates any provision of section 1962 . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interests in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

On its face, § 1963(a)(1) does not limit forfeitable interests to those in an enterprise. Rather, the statute speaks broadly of "*any* interest" which is the product of violating RICO's prohibitory provision, section 1962. Significantly, § 1963(a)(2) expressly limits forfeitable interests to those in an enterprise. Guiding our efforts at statutory construction in the past has been the presumption that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Wong Kim Bo,* 472 F. 2d 720, 722 (5th Cir. 1972).[11] Hence the limitation in § 1963(a)(2), and the absence of limitation in § 1963(a)(1), confirm what the straightforward language of the latter already tells us: that § 1963(a)(1) reaches *any* interest derived from a violation of § 1962.

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[11] As we shall note *infra,* that presumption is fully borne out in this case by the revisions made to § 1963(a) before it assumed the form in which it was enacted.

[2, 3] No definition of the term "interest" appears in RICO. We must assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U. S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962). The common or dictionary definition of the term includes "right, title, or legal share in something; participation in advantage, profit, and responsibility." Webster's Third New International Dictionary 1178 (1971). It has also been defined as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something." Black's Law Dictionary 729 (5th ed. 1979). The concept is therefore broad enough to include profits or income. Indeed, this understanding comports with the House Report's definition of "interest" as inclusive of "all property and interests, as broadly described, which are related to the violations." H. R. Rep. No. 1549, 91st Cong., 2d Sess. 57 *reprinted in* [1970] U. S. Code Cong. & Ad. News 4007.

Not only is the concept of profits or proceeds within the plain meaning of "interest," but the proceeds in question in this case were "acquired . . . in violation of section 1962," as § 1963(a)(1) requires. The insurance proceeds were the product of the defendants' violation of § 1962(c). That section makes it unlawful for "any person . . . associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." In this case, members of the arson ring conducted the affairs of that enterprise through the racketeering offenses of arson and mail fraud. Thus the unambiguous language of § 1963(a)(1) supports the view that profits derived from a pattern of racketeering activities are subject to forfeiture.

Defendants and amicus[12] maintain that their position —that forfeitable interests under § 1963(a)(1) are limited to interests in an enterprise—also is supported by the language of the statute. Their analysis of the statute cannot withstand scrutiny. The only express limitation on forfeitable interests imposed by the language of the statute itself is that the interest must be "acquired or maintained in violation of section 1962." Defendants and amicus, however, read a further limitation into this language. Specifically they argue that "one acquires or maintains an interest in violation of Section 1962 *only* when he acquires or maintains an interest *in contravention of Sections 1962(a) or (b).*" Brief for Amicus Curiae at 7 (emphasis added). Briefly, § 1962(a) proscribes the use or investment of illegally derived income to acquire, establish, or operate an enterprise, while § 1962(b) prohibits the use of racketeering methods to acquire or maintain an interest in an enterprise.[13] Accordingly, the defendants and amicus argue, the link between the prohibitory provisions in §§ 1962(a)

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[12]The National Association of Criminal Defense Lawyers, Inc. was permitted to participate as amicus curiae on rehearing.

[13]In pertinent part these sections provide:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest ,directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of

(Continued on next page)

and (b), which refer to acquiring or maintaining violations, and the penal provision in § 1963(a)(1), which refers to interests "acquired or maintained" in violation of RICO, is clear. This reasoning, however, is flawed in several respects. First, it completely ignores § 1962(c). The language of § 1963(a)(1) ties forfeiture to violation of *any* of the prohibitory provisions in § 1962, not just §§ 1962(a) and (b).[14]

Second, the argument of defendants and amicus misconstrues the function of the reference in § 1963(a)(1) to § 1962. To be sure, the reference serves a kind of limiting function, but that function is not to define the type of forfeitable interests, as defendants and amicus assume. Rather, the reference merely identifies the illegal activities which trigger the forfeiture penalty, supplying the nexus between the RICO violation and the forfeitable property which the government must establish at trial.[15]

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an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U. S. C. §§ 1962(a), (b) (1976).

[14]The district court in *United States* v. *Thevis*, 474 F. Supp. 134 (N. D. Ga. 1979), fell into this same error in concluding that § 1963(a)(1) does not reach proceeds derived from a violation of § 1962(c).

[15]Again, this second error also infected the district court's reasoning in *Thevis*. That court opined:

Since it is the addition of the "enterprise" concept which distinguishes a RICO prosecution under 18 U. S. C. § 1962

(Continued on next page)

Third, reading an enterprise limitation into § 1963 (a)(1) renders that section surplusage. Section 1963 (a) (2) on its face requires forfeiture of "any interest in . . . any enterprise which [the defendant] has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." The establishment, operation, and control language clearly refers to violations of §§ 1962(a) and (b). Section 1963(a)(1) would merely be duplicative of this provision if, as defendants contend, it reaches only interests in an enterprise acquired or maintained in violation of §§ 1962(a) and (b).

The cure for these defects in reasoning lies in an examination of the effect of § 1963(a)(1) on a § 1962(c) violation. Section 1962(c) makes conducting an enterprise through a pattern of racketeering unlawful. The forfeiture resulting therefrom, under § 1963(a)(1), is the interest (or interests) acquired through or as a result of that unlawful conduct. Forfeiture of defendant's interest *in* the enterprise is governed by the impact of § 1963(a)(1) and (2) upon § 1962(a) and (b). If § 1962(c) results in any forfeiture at all—and § 1963(a) provides

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from an ordinary prosecution directed at each of the individual predicated [sic] acts which constitute the pattern of racketeering activity, this Court is convinced that the "interest" subject to forfeiture under 18 U. S. C. § 1963(a) is limited to the interest in the enterprise and does not extend to fruits or profits generated from the enterprise.

Thevis, 474 F. Supp. at 142. That the enterprise concept is the overriding concept in RICO, distinguishing a RICO *prosecution* from an ordinary prosecution for the predicate acts of racketeering, does not necessarily mean that the enterprise concept is also a limitation on the type of property interests subject to forfeiture under § 1963(a)(1).

for forfeiture if one violates *any* § 1962 section—it must provide for forfeiture of something more than § 1962(a) or (b) or be mere surplusage. This interpretation restores § 1963(a)(1) to a role in the penalty scheme different from that played by § 1963(a)(2) and accords with the unambiguous language of the former section.

Turning now from the language of the statute itself to expressions of legislative intent, we find confirmation for our view that § 1963(a)(1) reaches profits derived from racketeering activity.[16] In its Statement of Findings and Purpose prefatory to the Organized Crime Control Act of 1970, Congress spoke of the problem it sought to resolve in the following words:

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized

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[16]The government directs our attention to RICO's liberal construction clause, arguing that it provides a definitive guide to the proper interpretation of § 1963(a)(1). In that clause Congress has mandated that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970. Pub. L. No. 91-452, § 904 (a), 84 Stat. 947 (1970). In response the defendants and amicus contend that following this congressional directive would violate the rule of lenity, which calls for strict construction of penal provisions. We need not resolve the suggested conflict because we find no ambiguity in the statute which would occasion the invocation of either of these interpretive aids. The rule of lenity "only serves as an aid for resolving an ambiguity." *Callanan v. United States*, 364 U. S. 587, 596, 81 S. Ct. 321, 326, 5 L. Ed. 2d 312 (1961); see *McElroy v. United States*, — U. S. —, —, 102 S. Ct. 1332, 1341, 71 L. Ed. 2d 522 (1982). As we discussed above, the language of § 1963(a)(1) is plain, and as we shall note *infra*, the legislative history is equally clear in revealing the broad scope which Congress intended § 1963(a) to have.

> crime *derives a major portion of its power through money obtained from such illegal endeavors* as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . .

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970) (emphasis added). Having identified the problem, Congress also determined the cause for the criminal justice system's failure to make inroads on organized crime and its economic power base and proposed the cure it envisioned the new Act to embody.

> [S]anctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing *new penal prohibitions*, and by providing *enhanced sanctions and new remedies* to deal with the unlawful activities of those engaged in organized crime.

Id. at 923 (emphasis added). The Senate Committee Report on the bill reiterated this philosophy.

> What is needed here, the committee believes, are new approaches that will deal not only with individuals,

> but also with the economic base through which those individuals constitute such a serious threat to the economic well being of the Nation. In short, an attack must be made on *their source of economic power itself*, and the attack must take place on all available fronts.

S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969) (emphasis added). Simply put, Congress' express objective in RICO is to take the profit out of organized crime.[17]

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[17]The legislative history is replete with references to this broad "hit them where they hurt" philosophy. Senator McClellan, chief sponsor of the Act, voiced the urgency of the need for new penal remedies to divest organized crime of the "ill-gotten gains [amassed by] criminals where they enter or operate an organization through a pattern of racketeering activity." 116 Cong. Rec. 592 (1970) (remarks of Sen. McClellan). Senator McClellan further commented: "Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, *forfeiture of their ill-gotten gains.*" 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) (emphasis added). R presentative Poff, a manager of the bill in the House, viewed the criminal forfeiture provision as more than a penalty. "After conviction, the ill-gotten gains must be forfeited to the Government. This sanction is not only poetic justice but a strong deterrent as well." 115 Cong. Rec. 9951 (1969). Senator Byrd, a member of the Senate Judiciary Committee, also spoke of the deterrence effected by the broad forfeiture sanctions: "By removing its leaders from positions of ownership, by preventing them and their associates from regaining control, *and by visiting heavy economic sanctions on their predatory business practices* this legislation should prove to be a mighty deterrent to any further expansion of organized crime's economic power." 116 Cong. Rec. 607 (1970) (remarks of Sen. Byrd) (emphasis added).

This court has also recognized that the purpose of the forfeiture provision is to "deprive those convicted of racketeering activity of their economic base so that they could not easily continue illegal activities." *United States v. L'Hoste*, 609 F. 2d 796, 814 (5th Cir.), *cert. denied*, 449 U. S. 833, 101 S. Ct. 104, 66 L. Ed. 2d 39 (1980).

The criminal forfeiture provisions of § 1963(a) are central to this remedial objective. Section 1963(a) launches a two-pronged attack on the sources of economic power which feed the coffers and activities of organized crime. It demands both divestiture of power over the enterprise itself[18] and seizure of the income derived from racketeering activities.

From the debates on the Organized Crime Control Act, it is clear that the target of Congress' attack included racketeering operations in which the chief type of property interest obtained by organized crime would be something other than an ownership or proprietary interest.[19] For example, the legislative history refers to instances in which organized crime members infiltrate legitimate businesses, "bleed" these companies through fraud or theft, and thus force them into bankruptcy.[20] Organized crime

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[18]We note that interests in an enterprise may take varying forms since they encompass both ownership interests (e. g., stock ownership or real property interests) and interests affording a source of influence over or control of the enterprise. *See, e. g., United States v. Rubin*, 559 F. 2d 975 (5th Cir. 1977), *vacated and remanded on other grounds*, 439 U. S. 810, 99 S. Ct. 67, 58 L. Ed. 2d 102 (1978) (forfeiture of union office).

[19]To be sure, Congress principally viewed RICO as a response to organized crime's infiltration into legitimate businesses. *United States v. Turkette*, 452 U. S. 576, 591, 101 S. Ct. 2524, 2533, 69 L. Ed. 2d 246 (1981). Accordingly, it contemplated the forfeiture primarily of ownership or controlling interests in such businesses. This does not mean, however, that we should blind ourselves to other forms of racketeering which Congress also declared to be the object of its concern and should embrace the circumscribed approach advanced by defendants and amicus.

[20]Senator Hruska documented one instance in which an organized crime figure became president of a company, bought large quantities of supplies on credit, ran up debts of approxi-

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was also linked to credit card and bad check frauds, 116 Cong. Rec. 970 (1970) (remarks of Sen. Bible), and to theft from welfare and pension funds, 115 Cong. Rec. 5874 (1969) (remarks of Sen. McClellan). The Senate Report cited examples of arson schemes, particularly in the context of liquidating defaulted loan shark debts by burning the debtor's property and collecting the insurance proceeds. S. Rep. No. 617, 91st Cong., 1st Sess. 77 (1969). *See also* 115 Cong. Rec. 5873 (1969) (remarks of Sen. McClellan). Narcotics trafficking, loan sharking, insurance fraud, extortion, gambling, and prostitution—all crimes in which the proceeds primarily consist of money—were all objects of congressional concern.[21]

In addition, when as here the RICO enterprise is an association in fact, rather than a legal entity, and the alleged RICO violation is conducting the affairs of this enterprise through racketeering methods, there often may be no forfeitable property other than the ill-gotten proceeds. Such may be the case not only with arson-for-profit rings but also with narcotics trafficking or pornography

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mately $1.3 million, made quick cut-rate sales, and pocketed about $750,000 of company funds for personal use. 115 Cong. Rec. 23569 (1969) (remarks of Sen. Hurska). Senator McClellan noted that "[a]pproximately 200 syndicate-inspired bankruptcy schemes are perpetrated annually." 116 Cong. Rec. 18940 (1970) (remarks of Sen. McClellan).

[21] See, e. g., 115 Cong. Rec. 5873, 5874, 5884-85 (1969) (remarks of Sen. McClellan); 116 Cong. Rec. 585, 586 (1970) (remarks of Sen. McClellan); 601 (remarks of Sen. Hruska); 606 (remarks of Sen. Byrd); 953 (remarks of Sen. Thurmond); 962 (remarks of Sen. Murphy); 970 (remarks of Sen. Bible); 35199 (remarks of Rep. St. Germain); 35300 (remarks of Rep. Mayne). *See also* 18 U. S. C. § 1961(1) (Supp. IV 1980) (list of predicate acts of racketeering activity which may form basis of RICO prosecution).

operations. It would certainly be contrary to Congress' stated intention to attack organized crime's source of economic power "on all available fronts," S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969), to insulate from forfeiture the sole product of many racketeering activities. Excluding proceeds from the reach of § 1963(a)(1) would provide an incentive, not a deterrent, to bankruptcy schemes and to other forms of racketeering which yield primarily cash revenues.

Still further support for a broad interpretation of § 1963(a)(1) is found in the legislative history.[22] An early draft of RICO, S. 1861, which was introduced on April 18, 1969, contained only one basic forfeiture provision and did expressly limit forfeitable property to interests in an enterprise. It read in full:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $10,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States all interest *in the enterprise* engaged in, or the activties of which affect, interstate or foreign commerce.

S. 1861, 91st Cong., 1st Sess. (1969). In mid-October, however, the Senate Judiciary Committee began a revision of RICO. Out of the revision developed a section 1963(a) containing two subparts. Section 1963(a)(2) retained the concept of limiting forfeiture to a defendant's interest in an enterprise. On the other hand, section

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[22]We are mindful that the language of the statute, and not the legislative history, is the law of the land. Indeed "the language of the statute [is] the most reliable evidence of its intent. . . ." *United States v. Turkette*, 452 U. S. 576, 593, 101 S. Ct. 2524, 2533, 69 L. Ed. 2d 246 (1981). With that caveat we proceed.

1963(a)(1) dropped the enterprise limitation altogether. We find it persuasive that Congress considered limiting all forfeitures under RICO to enterprise interests but, after extensive legislative work, ultimately opted to delete this across-the-board restriction.

Finally, in examining the legislative history we must address one of the chief reasons cited by the panel for its conclusion that § 1963(a)(1) does not reach the insurance proceeds at issue here. In August 1969 Congress received a letter from the Deputy Attorney General Richard P. Kleindienst commenting upon RICO's forfeiture provision. It expressed the views of the Justice Department as follows:

> It is felt that this revival of the concept of forfeiture as a criminal penalty, *limited as it is in Section 1963 (a) to one's interest in the enterprise* which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender is a matter of Congressional wisdom rather than of constitutional power. . . .

Measures Relating to Organized Crime, Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st. Cong., 1st Sess. 407 (1969) (emphasis added). The panel viewed the letter as indicative of congressional intent strictly to limit forfeitures. This interpretation of the letter's significance, however, ignores its context.

First, Congress was aware that it was entering new territory with the enactment of RICO; there was concern particularly over the constitutionality of the sanction of

the personam criminal forfeiture.[23] The Kleindienst letter addresses that concern, explaining that constitutional problems are avoided by the requirement of a nexus between a § 1962 violation and the interest to be forfeited. Furthermore, the letter was submitted as a commentary on S. 1961, the original draft of RICO, which as we have noted above, contained a unitary forfeiture provision with an express enterprise limitation. While the Senate Report on S. 30, the bill ultimately enacted, does cite Kleindienst's letter,[24] nothing in the report suggests that the letter provides a technical commentary on the scope of each section of the expanded bill.

Our more limited interpretation of the meaning of the Kleindienst letter finds support in the Justice Department's comments in subsequent House hearings on S. 30 as it passed the Senate.

> [Title IX] contains a provision for the forfeiture of any interest which has been attained in violation of the criminal provisions of the statute. The Department of Justice commented at length *upon the constitutionality of this sanction* in a report on S. 1861,

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[23]Reacting against the harsh English tradition of criminal forfeiture, the framers of the Constitution provided:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U. S. Const. art. III, § 3, cl. 2. The first Congress also enacted a provision barring corruption of the blood or forfeiture of estate upon conviction. Act of Apr. 30, 1790, I Stat. 117, ch. 9 § 24 (codified in 18 USC. § 3563).

[24]S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

> from which Title IX has been derived, in [the Kleindienst letter]. . . .

Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 171 (1970) (emphasis added). Notably, the Justice Department's comments on S. 30 do not described § 1963(a) forfeitures as limited to interests in an enterprise.

III

Our holding today squarely conflicts with that of the Ninth Circuit in *United States v. Marubeni America Corp.*, 611 F. 2d 763 (9th Cir. 1980).[25] *But see United States v. Godoy*, 678 F. 2d 84 (9th Cir. 1982) (holding that commercial real estate purchased with profits derived from racketeering activity is subject to forfeiture). For several reasons, some of which we have already discussed,[26] we find the *Marubeni* rationale unconvincing.

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[25]In *Marubeni* two corporations and several individuals were charged with mail fraud, wire fraud, interstate travel to commit bribery, and conspiracy to commit these offenses. These acts were committed as part of a scheme to rig the competitive bidding for contracts to supply telephone cable. The government appealed from the district court's dismissal of that portion of the indictment seeking forfeiture of the over $8.8 million in profit on the telephone cable contracts. These profits were alleged to be the product of the defendants' conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U. S. § 1962(c), *United States v. Marubeni America Corp.*, 611 F. 2d 763, 764 (9th Cir. 1980).

[26]Among the reasons compelling the Ninth Circuit's decision were the linguistic relationship between § 1963(a)(1) and §§ 1962(a) and (b) and the Justice Department views as expressed in the Kleindienst letter. 611 F. 2d at 766, 768. For a thorough critical analysis of the entire opinion see Trojanowski, *RICO Forfeiture: Tracing and Procedure; Appendix: United States v. Marubeni America Corp. and the Scope of RICO Forfeiture*, in 1 Techniques in the Investigation and Prosecution of Organized Crime 378a (G. Blakey ed. 1980), and Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?*, 55 Notre Dame Law. 777, 783-89 (1980).

In *Marubeni* the Ninth Circuit focused much of its attention on the "1% investment exception" in § 1962(a). *Id.* at 766-67. To the general prohibition in § 1962(a) on investment of income derived from a pattern of racketeering activity Congress added an exception.

> A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securties of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U. S. C. § 1962(a) (1976). From this the Ninth Circuit reasoned: "Congress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used." 611 F. 2d at 767. Our interpretation of § 1963(a)(1) does not, as the Ninth Circuit's comment would imply, render § 1962(a)'s 1% investment exception meaningless. We believe that the court in *Marubeni* obscured the separate functions of the prohibitory and penalty provisions of RICO.

The 1% investment exception evidences Congress' choice *not to criminalize* the investment of illegally derived income when the total investment is *de minimis* and thus would not grant the racketeer control over the business

entity. So understood the exception functions as a practical limit, exempting from prosecution what otherwise would constitute illegal activity under § 1962(a). If the investment of illegally derived income constitutes less than 1% of the issuer's outstanding shares, that investment alone violates no criminal proscription and hence triggers no forfeiture at all. The exception thus limits the definition of what is illegal. It does not immunize from forfeiture the fruits of activities that are made illegal under other provisions of § 1962; it "does not create a class of investment of illicit income exempt from forfeiture."[27]

The court in *Marubeni* also points to the use of the term "profits" in the forfeiture provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 848(a)(2)(A),[28] as evidence that Congress would have expressed itself more clearly in § 1963(a)(1) if it had intended forfeiture of racketeering income. 611 F. 2d at 766 n. 7. As we observed above, the concept of "interest" is broad and encompasses the notion of profits. Moreover, Congress' use of differing language for the two forfeiture provisions, with the more comprehensive term employed in RICO, is a logical byproduct of the different evils addressed by the two acts. Under attack in the Comprehensive Drug Abuse Prevention and Control Act of 1970 is the narcotics trafficking industry in which organized crime is engaged. The continued dealing in illegal drugs which is proscribed by that Act typically involves

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[27] *Trojanowski, supra* note 26, at 378aa.

[28] The statute provides: "Any person who is convicted . . . of engaging in a continuing criminal enterprise shall forfeit to the United States—(A) the profits obtained by him in such enterprise. . . ." 21 U. S. C. § 848(a)(2)(A) (1976).

cash transactions. By contrast, the interests acquired by violating RICO may take a variety of forms since many types of activity, primarily economic crimes, come within the scope of its prohibition. *See* 18 U. S. C. § 1961(1) (Supp. IV 1980) (definition of "racketeering activity"). Hence Congress' use of "profits" in 21 U. S. C. § 848(a)(2)(A) cannot support the negative inference in the court in *Marubeni* perceived it to have as to the meaning of "interest" in 18 U. S. C. § 1963(a)(1).

IV

At oral argument a question was raised as to whether the government has an obligation to trace and identify the current form of monetary proceeds before it may collect on a forfeiture order. Clearly this issue goes to collectibility and related procedures and not to the type of interests forfeitable under § 1963(a)(1). The parties did not brief this issue, and we do not resolve it today. Under 18 U. S. C. § 1963(c)[29] and Federal Rule of Criminal Procedure 32(b)(2),[30] the district court must determine the terms and conditions under which the defendants must comply with the monetary forfeitures declared in the special jury verdict and affirmed by our holding today. Because on remand the district judge must undertake this

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[29]In relevant part the statute directs: "Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeitable under this section upon such terms and conditions as the court shall deem proper." 18 U. S. C. § 1963(c) (1976).

[30]"When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper." Fed. R. Crim. P. 32(b)(2).

task, we make a few observations on the nature of the questions with which he must grapple. Focusing on the *in personam* character of RICO criminal forfeiture, the government contends in a supplemental letter to this court that it has no obligation whatever at this point[31] to trace the insurance proceeds into their current form. According to the government, the monetary forfeiture order is like any other money judgment, permitting it to satisfy the judgment from any of the defendants' current assets.[32] Commentators, on the other hand, have suggested that normal principles of restitution, particularly the theories of constructive trust and equitable lien, should be applied to trace forfeitable property that has changed form.[33] We intimate no views on the question, leaving it for the district

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[31]Questions regarding the specificity required in the indictment in order to comply with Federal Rule of Criminal Procedure 7(c)(2) and the extent to which tracing principles apply in satisfying that requirement are not before us.

[32]The government points out that its practice in prosecutions under the Comprehensive Drug Abuse Prevention and Control Act of 1970 is to trace the flow of profits and the property later acquired by the profits and to identify the final form of the profits in the indictment. That practice, the government advises, is compelled by the practical inability otherwise to identify the forfeitable sum involved in large drug transactions. The government submits, however, that such tracing is neither statutorily nor constitutionally required. It further points out that, because the amount of the insurance proceeds at issue here is readily identifiable, the inability to otherwise arrive at the forfeitable sum does not compel resort to tracing in this case.

[33]*Trojanowski, supra* note 26, at 364; Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. Ill. U. L. Rev. 225, 256 (1981).

court to determine in the first instance if the issue be raised there.[34]

V

RICO is a powerful and flexible weapon designed to break the economic power of organized crime and hence to undermine its ability to disrupt and drain the national economy. We acknowledge that its breadth supplies a potential for great abuse. The harshness of the statute's impact, however, cannot dictate the proper construction of its provisions. Congress was aware of the far-reaching measures it was enacting to deal with the unprecedented problem of organized crime. The plain language of the statute, its remedial and deterrent purposes, and the legislative history all compel the conclusion that § 1963(a)(1) encompasses forfeiture of the income or proceeds of racketeering activity.

The judgment of the district court on the forfeiture issue is

AFFIRMED; REMANDED FOR FURTHER PROCEEDINGS.[35]

POLITZ, Circuit Judge, joined by ALVIN B. RUBIN, VANCE, TATE, THOMAS A. CLARK, JERRE S. WILLIAMS and GARWOOD, Circuit Judges, dissenting:

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[34]The prospect of a priority conflict among competing claimants to the proceeds was also raised at oral argument. We note only that RICO itself directs the Executive to make "due provisions for the rights of innocent persons" in disposing of forfeited property. 18 U. S. C. § 1963(c) (1976).

[35]With regard to other issues addressed by the panel on appeal, the panel opinion is reinstated.

Respectfully, I dissent, regretting that I cannot join by colleagues in one of the last cases decided en banc by the Former Fifth Circuit. I am unable to concur in the holding that a payment made under a fire insurance policy necessarily constitute a forfeitable "interest" under 18 U. S. C. § 1963(a)(1), being of the opinion that the language, structure and purpose of the Racketeer Influenced and Corrupt Organization Act direct a different conclusion.

The issue posited by the court today is whether the term "interest," as used in § 1963(a)(1), "includes income or profits derived from a pattern of racketeering activity." That is the larger issue, but perhaps the more precise issue at bar is whether, under the RICO forfeiture provisions, a money judgment may be rendered against a defendant, in a sum equal to the amount paid under a fire insurance policy, for a loss occasioned by arson in a setting violative of RICO.

Just as nature abhors a vacuum, historically our society has abhorred forfeitures. As Judge Hill notes in footnote 23, the framers of the Constitution demonstrated their repudiation of the harsh English tradition of criminal forfeiture, and our very first Congress forbade the forfeiture of an estate because of a criminal conviction. Further, a forfeiture with an *in personam* application, as we have before us, is to be most charily assessed. It is from this perspective that I address the inquiry before the en banc court.

RICO is Title IX of the Organized Crime Control Act of 1970, Congress's solar plexus blow to organized crime. The Act and its legislative history reflect Congress's determination to counter the takeover of legitimate busi-

nesses, as well as to combat organized, illegal activities. In enacting RICO, Congress ordained a criminal statute of vast scope and stern consequences, aimed at punishing and deterring those who would wreak havoc in the social and economic fabric of our society.

The penalties to which Congress subjected a violator of RICO, as set forth in § 1963, include a fine of up to $25,000, imprisonment of up to 20 years, and the forfeiture to the United States of:

> (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U. S. C. § 1963(a)(1) & (2).

The court today concludes that the word "interest," as here used, includes income or profits derived from a pattern of racketeering activity. I do not share that conclusion, adhering to the view expressed in the panel opinion that the term "interest," as used in § 1963(a)(1) applies only to an interest in the enterprises envisioned in §§ 1962(a), (b) and (c) and not to income derived from illegal activity. Whether this distinction is wise, prudent or appropriate is, as I perceive it, a matter best left to the legislative branch, for it represents a significant policy decision.

The interests to be forfeited under § 1963(a)(1) are those acquired or maintained in violation of § 1962. Section 1962(a) prohibits acquiring, establishing or operating "an enterprise" with income derived "from a pat-

tern of racketeering activity or through collection of an unlawful debt." The exception contained in this section sharply focuses the pith of the entire section—money oozing from a pattern of racketeering activity, or resulting from collection of an unlawful debt, may not be used to infiltrate legitimate businesses unless the investment is made under certain limiting circumstances and constitutes less than 1% of the business's outstanding securities. This section prohibits the investment of tainted funds in a legitimate enterprise. Congress determined to place the protective mantle of the federal criminal law around legitimate businesses, guarding them from the corruption inherent in soiled funds. Section 1962(b) proscribes the acquiring or maintaining of an interest in or control of an enterprise through racketeering activity or by collection of an unlawful debt. Subsection (c) proscribes the conduct of the affairs of an enterprise through racketeering activity or unlawful debt collection. Recently, the Supreme Court made clear that subsections (b) and (c) apply to both legitimate and illegitimate associations. *United States v. Turkette*, 452 U. S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981).

I am persuaded that the forfeiture sanction intended by § 1963(a)(1) relates to interests in a business acquired with tainted money (§ 1962(a)), and interests in any enterprise acquired or maintained by racketeering activity or unlawful debt collection (§ 1962(b)). I am further persuaded that § 1963(a)(2) relates primarily to an interest in an enterprise which is involved in conduct violative of § 1962(c). To me, the text of these sections clearly reflects that Congress made interests in enterprises the grist of forfeiture. The sections seek to pre-

vent the use of ill-gotten gains to corrupt businesses, to prevent the acquiring and maintaining of an interest in an enterprise through illegal activities, and to prevent the involvement of enterprises in illegal activities.

There are other reasons to believe that Congress did not intend "income" to be synonymous with "interest" for the purposes of forfeiture under § 1963. Although the definitional section, § 1961, does not include the specific meaning to be ascribed to "interest" or "income," the term "any interest" and the word "interest" appear in several places throughout the statute. Section 1961(3) refers to a "legal or beneficial interest in property." Section 1962(a) refers to "any interest in . . . any enterprise." Section 1962(b) repeats the words "any interest in . . . any enterprise." Further, § 1964(a), the civil remedies section, prescribes that the court may order a person "to divest himself of any interest, direct or indirect, in any enterprise." In each instance the meaning is clear—an "interest" is an interest *in an enterprise.*

The panel found persuasive the analysis of our colleagues of the Ninth Circuit in *United States v. Marubeni America Corp.*, 611 F. 2d 763 (9th Cir. 1980), who concluded that the forfeiture in RICO extends only to interests in an enterprise and does not include income or proceeds from a pattern of racketeering activity. I continue to be of that view and also find persuasive the discussion in *United States v. Thevis,* 474 F. Supp. 134 (N. D. Ga. 1979) and *United States v. Meyers,* 432 F. Supp. 456 (S. D. Pa. 1977).

The majorty concludes that "readng an enterprise limitation into § 1963(a)(1) renders that section surplus-

age." I disagree. One example underscores the error in this suggestion. Hypothesize that an individual uses income from racketeering activity to purchase 2% of the stock of a corporation listed on the stock exchange. The investment is totally passive; no element of control or influence envisioned by § 1963(a)(2) is involved. This interest would not be forfeitable under § 1963(a)(2), but it would be forfeitable under § 1963(a)(1) since the acquisition violates § 1962(a). The recognition of an enterprise limitation in § 1963(a)(1) does not, therefore, render that section surplusage.

The court today is not impressed with a portion of the legislative history cited by the panel, specifically the August 1969 letter from Deputy Attorney General Richard P. Kleindienst, in part because the letter specifically addressed another pending RICO proposal, S. 1861. Although acknowledging that the Kleindienst letter is cited in the Senate Report on S. 30, the enacted bill, the opinion maintains that the letter provides little meaningful guidance on the scope of the legislation as finally adopted. I disagree.

Although the Kleindienst letter refers to S. 1861, the Senate Report on S. 30 cites the letter as an accurate interpretation of the forfeiture clause. S. Rep. No. 91-617, 91st Cong., 1st Sess., 78-80 (1969). That report, in explaining the forfeiture provision notes:

> Section 1963 provides criminal penalties for the violation of section 1962, above. Subsection (a) provides the remedy of criminal forfeiture. . . . The language is designed to accomplish a forfeiture of any "interest" of any type *in the enterprise* acquired by the defendant or in which the defendant has participated in violation of section 1962.

(Emphasis added.) *Id.* at 160. Accord, *id.* at 34.

We find similar language in the House Report which speaks to forfeiture of interest "in an enterprise." H. R. Rep. No. 91-1549, 91st Cong., 1st Sess. 35 and 57 (1970), reprinted in 1970 U. S. Code Cong. & Admin. News, 4007, 4010.

The essence of the forfeiture grounds a further reason for my disagreement with the en banc court's conclusion that § 1963 allows for forfeiture of monies received as insurance proceeds. Although general forfeitures are historically disfavored, Congress has frequently used the onus of specific forfeitures in combating illegal activities. *See, e. g.*, 15 U. S. C. § 11 (forfeiture of property acquired in violation of anti-trust laws); 15 U. S. C. § 1177 (forfeiture of property used in connection with illegal gambling); 16 U. S. C. §§ 65, 117(d), 128, 171, 256c, 4081 (forfeiture of guns and other equipment used unlawfully in national parks); 18 U. S. C. § 924 (forfeiture of firearms used illegally); 18 U. S. C. § 1082 (forfeiture of property used in connection with illegal gambling); 18 U. S. C. § 3612 (forfeiture of bribe monies illegally received by public officials); 18 U. S. C. § 3615 (forfeiture of property used in connection with liquor violations); 18 U. S. C. § 3617(d) (forfeiture of vehicles and aircraft seized for a violation of liquor laws); 18 U. S. C. §§ 3618 & 3619 (forfeiture of conveyances used to introduce intoxicants into Indian territories); 19 U. S. C. § 1306 (forfeiture of unwholesome imported meat); 19 U. S. C. §§ 1453 & 1492 (forfeiture of property seized in violation of customs laws); 21 U. S. C. § 334 (forfeiture of adulterated food); 31 U. S. C. § 490 (forfeiture of funds illegally withheld by public official); 49 U. S. C. §§ 781 & 782 (forfeiture of vessels, vehicles and aircraft used to transport contraband). In each of these

instances, the forfeiture statutes provided for *in rem* actions against things put to illegal use. Although RICO prescribed an *in personam* forfeiture, it does not provide an unlimited sanction but is, I believe, restricted to the forfeiture of a specific interest in an enterprise which was acquired, or over which the defendant exercised control, contrary to § 1962. If Congress had intended otherwise, I am convinced it would have said so clearly and unequivocally.

No strangers to forfeitures generally, Congress is also no stranger to forfeitures of fruits and profits. If Congress meant to impose a forfeiture of income and proceeds in RICO, I suggest Congress could and would have done so in unmistakeable language. Congress knows how to decisively direct the forfeiture of profits. The same Congress which adopted RICO, in a matter of days adopted the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U. S. C. § 848(a)(2) states: "Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—(A) *the profits* obtained by him in such enterprise. . . ." (emphasis added). That is the kind of specification one would expect Congress to use when creating our first *in personam* forfeiture statute.

The court today would distinguish this variance in Congressional approach by observing that narcotics trafficking typically involves cash transactions while RICO violations result in interests which take a variety of forms. I disagree with so light a rejection of what I see as a meaningful, instructive variant.

Based on the foregoing, I am of the view that Congress did not intend to include in the § 1963(a)(1) for-

feiture provision, fire insurance proceeds or other fruits and profits obtained from RICO proscribed activities, other than those which are manifested as interests in one of the enterprises described in § 1962. I am cognizant that this conclusion occasions problems with respect to associations in which one cannot own a legal interest, as in the case *sub judice*. This limitation was recognized by the Justice Department in its comments on the legislation, when it observed that "there is often nothing to forfeit . . . in the case of individuals associated in fact." *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 *Am. Crim. L. Rev.* 379, 391 (1980) (*quoting* U. S. Department of Justice, Explanation of the Racketeer Influenced and Corrupt Organization Statute 2 (4th ed.)) Under my analysis, the kind of enterprise necessarily would be critical in the determination of forfeitable interests. That this poses an enforcement burden or hurdle is, again, a legislative consideration.

Finally, accepting the proposition that insurance proceeds are forfeitable, I question whether the forfeiture sanction is applicable to Russello and Rodriguez. These two defendants owned and insured buildings before the advent of the RICO arson ring. They later participated and feloniously burned their properties. The insurance proceeds may be taken as a different manifestation of a pre-RICO violation asset. If so, are the insurance payments truly income, fruits, revenue or profits of racketeering activities?

Regardless, these proceeds, based on arson and the payments of which were induced by fraud, are very likely to be defeasible. One would expect that under the insurance contract, and controlling state law, the insurer would

be entitled to recapture the payments. In that event, what happens to the forfeiture decrees which are non-asset oriented money judgments, collectible from the defendants and their estates? Assuming recapture by the insurer, or diversion of all or a portion to an innocent third party such as a mortgage holder, will the United States still have an enforceable money judgment against the defendant and his estate? Presumably so, and if that presumption is correct, what about the concept of divestiture of ill-gotten gains and the separation of the convicted defendant from the fruits of his illegal labors? Will this matter not in fact resolve into the forfeiture becoming an additional fine? Did Congress really intend to establish a latent fine with a potential for exceeding the maximum statutorily stated fine ten-fold, twenty-fold or one hundred-fold?

I suggest that this type of difficulty is inherent in today's decision and is a direct concomitant of our holding that the forfeitable interest under § 1963(a)(1) extends beyond a present, discernible interest in an existing enterprise.

I respectfully dissent.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

January 10, 1983

Ronald A. Dion, Esq.
2020 Northeast 163rd Street
Suite 300
N. Miami Beach, Florida 33162

RE: Joseph C. Russello v.
United States
No. 82-472

Dear Mr. Dion:

The Court today entered the following order in the above-entitled case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the rules.

I have been instructed to inform you that Rule 34(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not have printed on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $100, Rule 45(a), is due and payable.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By MISS JUNE HOFFMANN

(Miss) June Hoffmann
Assistant Clerk

enclosures

Supreme Court, U.S.
FILED
DEC 29 1982
ALEXANDER L. STEVAS
CLERK

No. 82-472

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. RUSSELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

D. LOWELL JENSEN
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QUESTION PRESENTED

Whether profits from racketeering activities acquired through a violation of 18 U.S.C. 1962(c) constitute an interest subject to forfeiture under 18 U.S.C. 1963(a)(1).

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-36) is reported at 681 F.2d 952. The panel opinion is reported at 648 F.2d 367.[1]

JURISDICTION

The judgment of the en banc court of appeals was entered on August 2, 1982. The petition for a writ of certiorari was filed on September 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The portion of the panel opinion relating to the forfeiture issue appeared in the advance sheets (648 F.2d at 407-409) but was deleted after rehearing was granted.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and 15 others were convicted of racketeering and mail fraud, in violation of 18 U.S.C. 1341, 1962(c), and 1962(d).[2] After the verdicts on the criminal charges were returned, the jury returned a special verdict requiring the forfeiture, pursuant to 18 U.S.C. 1963(a) and (c), of four payments totalling $340,043.69 that were made to petitioner by his insurance company (Pet. App. 5-6). The district court then entered a judgment of forfeiture against petitioner in that sum. A panel of the court of appeals reversed, but the court of appeals sua sponte ordered rehearing en banc on the forfeiture issue and vacated that portion of the panel opinion (648 F.2d at 409). The en banc court then affirmed the district court's judgment of forfeiture (Pet. App. 1-36).

1. The proof at trial is described in the panel opinion (648 F.2d at 378-380, 409-411) and the en banc opinion below (Pet. App. 4-5). Briefly, the evidence showed that petitioner and his co-conspirators formed an association in fact responsible for burning down buildings in order to collect insurance proceeds. Petitioner was the owner of the Central Professional Building in Tampa. That building consisted of two sections—an original, smaller section in the front and a newer addition in the rear. The

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[2] The court of appeals panel, although reversing the forfeiture, affirmed petitioner's convictions on two counts of mail fraud, conspiracy to violate the RICO statute, and a substantive RICO violation (*United States* v. *Martino*, 648 F.2d 367 (5th Cir. 1981)), and this Court denied certiorari, No. 81-1458 (Apr. 26, 1982).

rear part, which was completed in the summer of 1975, contained apartments, offices, and parking facilities. Petitioner schemed to burn the front section, to collect the insurance proceeds on his $925,000 in policies, and to use the funds to rebuild the front part to match the newer and more profitable rear section. A fire was subsequently set, and petitioner collected $340,043.69 in insurance proceeds.

2. In initially reversing the judgment of forfeiture (slip op. 8274-8276), a panel of the court of appeals found that "Congress did not intend to include in the forfeiture provision of Section 1963 the fruits and profits obtained from a pattern of racketeering activity" (slip op. 8275). The en banc court of appeals disagreed and reinstated the forfeitures. The court first noted that racketeering profits fall within the plain meaning of Section 1963(a)(1), which calls for the forfeiture of "any interest * * * acquired or maintained in violation of section 1962." The term "any interest," the court held, was to be given its broad, literal meaning (Pet. App. 7-8).

Rejecting the argument that Congress intended to reach only "interests in an enterprise," the court noted (Pet. App. 7) that such a limitation was omitted from Section 1963(a)(1) but was expressly included in other provisions of the statute with respect to which Congress intended to impose such restrictions. The court also rejected (Pet. App. 8-11) the argument that Section 1963(a)(1) applied only to interests acquired in violation of Section 1962(a) or (b) and not, as in this case, interests acquired in violation of Section 1962(c). Finally, the court found support for its interpretation in legislative history showing that Congress intended to create a broad forfeiture penalty and to remove the profit from organized crime (Pet. App. 12-20).

DISCUSSION

This case presents a potentially significant question concerning the interpretation of the RICO statute that has divided the courts of appeals, *i.e.*, whether income derived from racketeering activity is subject to forfeiture. Accordingly, we do not oppose the grant of the instant petition for a writ of certiorari.

1. The court below held that income and profits obtained from racketeering activity in violation of 18 U.S.C. 1962 are subject to forfeiture under 18 U.S.C. 1963(a)(1), which requires the forfeiture of "any interest * * * acquired or maintained in violation of [Section 1962]" by any person convicted of violating that provision. As the court below recognized (Pet. App. 21), its decision is inconsistent with *United States* v. *Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980),[3] in which the court held that 18 U.S.C. 1963(a)(1) reaches only interests in an enterprise and not uninvested racketeering profits or income.[4]

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[3] There is a factual distinction between *Marubeni* and the present case, but neither court relied upon that distinction in reaching its decision. In *Marubeni* the interest that the government sought to forfeit was all monies received under a public contract obtained through bid-rigging. These monies represented not only profits but the actual cost of goods and services furnished under the contract. Here, by contrast, the entire amount forfeited consisted of profit from arson and fraud. Nevertheless, it appears to us that the holding and reasoning of *Marubeni* would require the Ninth Circuit to reach the opposite result from the Fifth Circuit on the facts of the instant case.

[4] Petitioner erroneously asserts (Pet. 6) that the decision below also conflicts with *United States* v. *Long*, 654 F.2d 911 (3d Cir. 1981). That case, however, concerned forfeiture

This is an issue of substantial and continuing importance. The government's ability to punish and deter racketeering depends to a significant degree upon its ability to deprive those engaged in organized crime of their sources of economic power. Consequently, the criminal forfeiture provisions of the RICO statute are among the most potent prosecutorial weapons in the government's efforts to curb organized crime. As construed by the Ninth Circuit in *Marubeni*, however, those provisions are deprived of much of their effectiveness, because the forfeiture of uninvested racketeering profits and income is not allowed. While the government is permitted under that interpretation to seek forfeiture of interests in an "enterprise," that power is of little use in the large number of cases in which the enterprise charged in the indictment is an informal association-in-fact devoted solely to criminal ends. Such enterprises typically have no formal legal existence, do not issue stock, do not have formal officers or employees, and do not hold property in their own names. Thus, there are usually no interests in such enter-

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under the narcotics forfeiture statute, and the reference to RICO forfeiture in a footnote is dictum (see *id.* at 915 n.6). Similarly, petitioner relies upon dictum in *United States* v. *Rubin*, 559 F.2d 975, 990-993 (5th Cir. 1977), which upheld the forfeiture of a union office under 18 U.S.C. 1963(a). Assuming *Rubin* conflicted with the decision below, it was overruled by the en banc decision in this case. Finally, petitioner relies upon *United States* v. *Godoy*, 678 F.2d 84 (9th Cir. 1982), petition for cert. pending, No. 82-538, which was decided by the same court that decided *Marubeni*. *Godoy*, however, concerns an entirely different question (on which the government prevailed), *i.e.*, whether an interest in an enterprise acquired through the investment of racketeering profits is subject to forfeiture under 18 U.S.C. 1963(a)(1).

prises that may be obtained by forfeiture. Moreover, even in cases involving other types of enterprises, the government will be unable to take the profit out of organized crime unless it can seek forfeiture of racketeering profits and income that are not used to acquire interests in enterprises. Under *Marubeni*, however, racketeering profits and income are probably beyond the reach of the RICO forfeiture provisions if deposited in a bank or used to purchase precious metals or other valuable objects.

2. a. While we do not oppose the granting of the instant petition for a writ of certiorari, we believe that the decision below was correct. 18 U.S.C. 1963(a) provides that upon conviction a defendant shall forfeit to the United States "(1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." Petitioner argues that the term "interest," as used in Section 1963(a)(1), does not encompass profits or proceeds but instead means "interest[] in an enterprise." However, as the court below concluded (Pet. App. 8), if Congress had intended to limit forfeiture to interests "in an enterprise" it could have done so expressly, as it did in Section 1963(a)(2). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, * * * [it] acts intentionally and purposely in the disparate inclusion or exclusion.'" Pet. App. 7, quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); see also *United States* v.

Wooten, No. 81-5266 (4th Cir. Sept. 3, 1982), slip op. 25.

Moreover, as the en banc court recognized (Pet. App. 7-8), "the ordinary meaning of the words used [in the statute]" (see *Richards* v. *United States*, 369 U.S. 1, 9 (1962)) encompasses profits or proceeds. Dictionaries include "profit" in their definitions of "interest."[6] Congress similarly used the term broadly in its reports and debates. For example, it referred to criminal forfeiture "of all property and interests, as broadly described, which are related to the [Section 1962] violations." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 57 (1970).[7]

b. The court below also correctly rejected petitioner's claim (Pet. 10-11) that the legislative history demonstrates that Congress did not wish to permit forfeiture of racketeering profits (Pet. App.

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[6] See, *e.g.*, *Webster's Third New International Dictionary, Unabridged* 1178 (1976); *The Random House Dictionary of the English Language, Unabridged* 741 (1966). *Black's Law Dictionary* 950 (4th ed. 1968), explains that interest includes the "right to have the advantage accruing from anything," and states that "interest" is "the most general term that can be employed to denote a right, claim, title, or legal share in something."

[7] Petitioner argues (Pet. 9) that "interest" must derive its meaning from Section 1962 because the statute refers back to that section. The en banc court correctly rejected that interpretation of the reference, stating (Pet. App. 10): "To be sure, the reference serves a kind of limiting function, but that function is not to define the type of forfeitable interests, as defendants and amicus assume. Rather, the reference merely identifies the illegal activities which trigger the forfeiture penalty, supplying the nexus between the RICO violation and the forfeitable property." In other words, the reference to Section 1962 defines the illegal activity, not the term "interest."

12-20). After carefully examining the legislative history, the court concluded that "Congress' express[ed] objective * * * [was] to take the profit out of organized crime" (Pet. App. 14; footnote omitted). The court also found to be inconclusive (Pet. App. 18-20) a letter to Congress by then Deputy Attorney General Kleindienst (*Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 407 (1969)) addressing the constitutionality of the RICO criminal forfeiture provisions. Mr. Kleindienst wrote that the forfeiture provision was constitutional since it was limited to a defendant's "interest in the enterprise which is the subject of the specific offense." As the court explained (Pet. App. 20), the letter related specifically to the RICO legislation then pending, which included a single forfeiture provision applicable only to interests in an enterprise. Although the Senate Report on the RICO statute cited that letter (see S. Rep. No. 91-617, 91st Cong., 1st Sess. 79 (1969)), "nothing in the report suggests that the letter provides a technical commentary on the scope of each section of the expanded bill" (Pet. App. 20).

c. Petitioner also suggests (Pet. 7) that inclusion in the Controlled Substances Act, 21 U.S.C. 848(a)(2)(A), of a forfeiture provision specifically directed at illegal "profits" is probative of a congressional intent to exclude profits from the reach of the RICO statute.[8] However, language in one

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[8] 21 U.S.C. 848(a)(2) provides:

Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

statute generally sheds little light upon the meaning of language in a separate statute, even where the two were enacted during the same session. Here, as the court below correctly observed (Pet. App. 23), the use of "the more comprehensive term in RICO is a logical byproduct of the different evils addressed by the two acts." The RICO statute was broadly aimed at all the sources of organized crime's economic power, including cash assets and profits, ownership interests in legitimate and illegitimate enterprises, all types of contraband, stolen securities, and illegally obtained contract rights. Only a broadly defined forfeitable interest could include all these assets and other sources of power. By contrast, since the narcotics activity proscribed by 21 U.S.C. 848 consists of repeated and continuing dealings in the importation or sale of illegal drugs for money, an interest acquired in violation of that provision will usually consist of profits. Thus, it was natural that Congress employed much narrower and more specific language in 21 U.S.C. 848(a)(2)(A).[9]

(A) the profits obtained by him in such enterprise, and

(b) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

[9] Indeed, several earlier narcotics forfeiture bills proposed by the 91st Congress (see H.R. 1690, H.R. 17463, S. 3246) provided for forfeiture of "(1) the profits obtained by any activity in violation of the Act, (2) any interest acquired or maintained in violation of the Act, and (3) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise." Subsection (2) was ultimately eliminated from the final version. Although the reasons behind its elimination were not expressed, it is safe to presume that Congress thought it redundant since the interests were already reached by forfeiture of profits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 82-472

In The

Supreme Court of the United States

October Term, 1982

JOSEPH C. RUSSELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the term "interest" as used in 18 U.S.C. § 1963(a) (1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations statute (RICO) 18 U.S.C. §§ 1961 - 1968, does not include income or profits derived from a pattern of racketeering activity?

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The term "interest" as used in 18 U. S. C. § 1963 (a) (1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations statute (Rico) 18 U. S. C. §§ 1961-1968, does not include income or profits derived from a pattern of racketeering activity. 5

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No. 82-472

In The

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JOSEPH C. RUSSELLO,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit en banc is reported at 681 F. 2d 952. The panel opinion is reported at 648 F. 2d 367.

JURISDICTION

The En Banc judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 2, 1982. The Petition for Writ of Certiorari was filed on September 9, 1982. Certiorari was granted January 10, 1983. The jurisdiction of this court is invoked under 28 U. S. C. § 1254.

STATUTES INVOLVED

The following statutes are involved in this case and are reproduced as part of the Appendix to this brief:

1. 18 U. S. C. § 1962
2. 18 U. S. C. § 1963

STATEMENT OF THE CASE

Petitioner was indicted on June 8, 1977, in an 83 page Indictment, along with 21 co-defendants. The Government alleged violations of substantive RICO, 18 U. S. C. § 1962-(c); RICO conspiracy, 18 U. S. C. § 1962(d); and two mail frauds. The RICO conspiracy charge included a prayer of forfeiture of monies received by the petitioner through a course of racketeering.

On February 24, 1978, the jury returned guilty verdicts against petitioner on each of the four charges, as

well as a verdict of forfeiture. Judgments of sentence and forfeiture were entered.

On appeal to the Fifth Circuit Court of Appeals, petitioner's convictions were affirmed, but the order of forfeiture was vacated. On Rehearing En Banc, the Court upheld the forfeiture in its decision of August 2, 1982.

Petition for Writ of Certiorari was filed on September 9, 1982. Certiorari was granted January 10, 1983.

STATEMENT OF FACTS

The issue presented upon this Petition for Writ of Certiorari is a purely legal question, the resolution of which need not be considered in light of the facts presented at trial. As stated in the En Banc opinion of the Fifth Circuit Court of appeals, the facts are as follows:

> Briefly, the evidence showed that a group of individuals associated for the purpose of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowners, promoters, investors, and arsonists operated to destroy at least eighteen residential and commercial properties in Tampa and Miami, Florida between July, 1973 and April, 1976. The panel summarized the ring's operations as follows:
>
> > At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought

> buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds.

As pointed out in the En Banc dissenting opinion, Russello was one of the individuals who owned and insured his building before the advent of the RICO arson ring. He later participated and feloniously burned his property.

Additional facts are set forth in the En Banc opinion of the Fifth Circuit Court of Appeals reproduced in the Appendix.

SUMMARY OF ARGUMENT

18 U. S. C. § 1963 proscribes what is subject to forfeiture upon a RICO conviction. The term "interest" contained in 18 U. S. C. § 1963(a)(1) is limited to interests in the enterprise. Had Congress intended profits and proceeds to be forfeitable, it would have so designated as it had in the accompanying Continuing Criminal Enterprise statute. Furthermore, legislative history and intent demonstrate the policy considerations behind limiting forfeitable interests to interests in the enterprise: the exorcism of racketeering from and the rejuvenation of legitimate business. Although policy determinations may warrant the forfeiture of profits and proceeds, as evidenced by subsequent express state legislation, the extension of the definition of "interest" beyond the express wording of the statute and beyond legislative intent should be made only by Congressional decree.

ARGUMENT

The term "interest" as used in 18 U. S. C. § 1963 (a) (1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations Statute (RICO) 18 U. S. C. §§ 1961-1968, does not include income or profits derived from a pattern of racketeering activity.

This Court is presented, for the first time, with deciding the meaning of the term, "interest" as used in 18 U. S. C. § 1963(a)(1), the criminal forfeiture provision of the Racketeer Influenced and Corrupt Organizations Statute (RICO) 18 U. S. C. § 1961 - 1968. The lower courts, in deciding this issue, are split between those courts which recognize income and profits to be a forfeitable "interest", *United States v. Martino,* 681 F. 2d 952 (5th Cir. 1982); *United States v. Romano,* 523 F. Supp. 1209 (S. D. Fla. 1981); and those which do not. *United States v. Marubeni America Corporation,* 611 F. 2d 673 (9th Cir. 1980); *United States v. Meyers,* 432 F. Supp. 456 (W. D. Pa. 1977); and *United States v. Thevis,* 474 F. Supp. 134 (N. D. Ga. 1979).

The concept of *in personam* forfeiture is foreign to American jurisprudence. Yet, this concept was revived by the passage of the Racketeer Influenced and Corrupt Organizations Statute (RICO) 18 U. S. C. § 1961 - 1968.

> Unlike *in rem* forfeiture proceedings against contraband or articles put to unlawful use, § 1963 operates against the person of the defendant and includes within the punishment for his crime forfeiture of a portion of his estate. Such a provision, while known to the common law in England and the colonies, is foreign to the federal criminal law. The 91st Con-

> gress recognized that, in passing § 1963, it was partially repealing a statute passed by the First Congress, which in its present form provides that: "No conviction or judgment shall work corruption of blood or forfeitures of estate." 18 U. S. C. 3563.

United States v. Rubin, 559 F. 2d 975 at 991, n. 15 (5th Cir. 1977).

In light of the history of American jurisprudence disfavoring forfeitures, *see, United States v. Grande,* 620 F. 2d 1026 (4th Cir. 1980), it is not surprising that criminal and forfeiture statutes must be strictly construed. *United States v. Rubin, supra*; *Baca v. Commissioner,* 326 F. 2d 189 (5th Cir. 1964); and *United States v. Enmons,* 410 U. S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973).

18 U. S. C. § 1963(a) provides in part that, "Whoever violates any provision of § 1962 . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of § 1962." It is respectfully submitted that the express wording of 18 U. S. C. § 1963(a)(1) does not include income, money, or profits; nor are such concepts made a part thereof by legislative history and intent.

In recognizing that 18 U. S. C. § 1963 does not specify a forfeiture of profits, the Court in *United States v. Meyers, supra,* stated in footnote 18 that the continuing criminal enterprise statute, 21 U. S. C. § 848(a)(2), which was passed within weeks of the RICO statute, specifically mentions the forfeitability of profits. "By contrast, the terms of 21 U. S. C. § 848(a)(2)(A) provide, (with respect to narcotics offenses) for forfeiture of 'the profits obtained . . . in such enterprise.' 21 U. S. C. 848(a)(2)(B) then contains language substantially identical with that involved here." Based upon this failure of the legislature

to specify profits in the RICO statute, when they had done so in the Continuing Criminal Enterprise statute, the Court reasoned that the legislature did not intend to reach profits, but rather intended to reach ownership and investment interests in the enterprise.

The failure of Congress to specify profits in the RICO forfeiture statute has also been recognized by the Third Circuit in *United States v. Long*, 654 F. 2d 911 (3rd Cir. 1981). In comparing 18 U. S. C. § 1963 with 21 U. S. C. § 848, the Court recognized in footnote 6 that:

> While these forfeiture provisions are similar, they are by no means equal in scope; the *in personam* forfeiture of C. C. E. covers all the profits earned from any continuing criminal enterprises. RICO, conversely, requires the defendant to forfeit only his personal interest in the tainted enterprise.

Likewise, this failure to mention income or profits in the RICO forfeiture statute was recognized in *United States v. Marubeni America Corporation, supra:*

> Section 1962(a) makes certain investments of racketeering "income" illegal. When Congress meant "income," . . . it used that term.' 'We note that Congress specifically provided for forfeiture of "profits" obtained from a criminal enterprise in the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U. S. C. § 848(a)(2)(A). The Drug Abuse Act was passed by the same Congress in the same month as RICO. Had Congress intended forfeiture of racketeering income, we believe it would have expressly so provided.

The express wording of 18 U. S. C. §§ 1962 and 1963 was further evaluated in *United States v. Thevis, supra,* wherein the Court held:

> That this distinction between income and interest was recognized by Congress is illustrated by 18 U. S. C. § 1962(a). That subsection makes it illegal to invest income derived from a pattern of racketeering activity by acquiring an interest in an enterprise. Though Congress recognized that income and profits could be generated by a pattern of racketeering activity, it chose to require forfeiture only of the interest in, and not the income of, a § 1962 enterprise.

Since the creation of RICO and its forfeiture proceedings, several states have adopted identical or similar legislation. These State legislatures, in an apparent recognition of the failure of Congress to include the forfeiture of money, income, and profits, expressly include such provisions. For example, Arizona Revised Statutes 13-2314 copied 18 U. S. C. § 1963(a)(1) and (2), but added in addition thereto the following forfeiture provisions: "All proceeds traceable to an offense included in the definition of racketeering . . . and all monies, negotiable instruments, securities, and other things of value used or intended to be used to facilitate commission of the offense."

Many states, recognizing the limits of forfeitable "interest", have expanded forfeitures to include "any interest or property he has acquired or maintained in violation of (the racketeering) chapter"; Rhode Island General Laws 7-15-3, Hawaii Revised Statutes, § 842-3; or eliminated the concept of "interest" entirely, relying instead upon any or all property. Criminal Code of Georgia, 26-3405, Indiana Statutes Annotated, 34-4-30.5-3. Several states permit forfeiture of, "all property, real or personal, including money. . . ." Florida Statutes Annotated, 895.05, Colorado Criminal Code, 18-17-106, and Oregon Revised

Statutes, 166.725. And, Connecticut in Public Act No. 82-343 has extended forfeitures to include, "any property he has acquired or maintained in violation of this Act, including profits derived therefrom. . . ."

Thus, the states which have followed the lead of the Federal Government into the area of racketeering prosecutions have recognized the limits of forfeitable "interest", and have chosen instead to specify the forfeiture of all property or money. Had the states believed the word "interest" to include money or profits, the modification of the forfeiture language contained in the state versions would not have been necessary.

However, if "interest" does not, on its face, include the concept of money or profits, what does it encompass? The legal concept of "interest" is defined in Black's Law Dictionary, Fifth Edition, as, "the most general term that can be employed to denote a right, claim, title, or legal share *in something*". (Emphasis added.) "Interest", by definition, includes of necessity an interest in something.

The "something" is provided by Congress in its wording of 18 U. S. C. § 1963(a) (1), "Whoever violates any provisions of § 1962 . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of § 1962." As pointed out in *United States v. Thevis, supra,* "Curiously, the term 'interest' is not defined by RICO. But, as employed in 18 U. S. C. § 1963(a), it derives its meaning from the activities barred by § 1962". Thus, a direct relationship exists between that which is subject to forfeiture under 18 U. S. C. § 1963 as a result of racketeering activity and that which constitutes racketeering activity under 18 U. S. C. § 1962.

> 18 U. S. C. § 1963(a) (1) is directed at an interest acquired or maintained *"in violation of Section 1962."* (emphasis added). The statutory concept on which 18 U. S. C. § 1962 rests is the "enterprise" concept; that is to say, it is the acquisition, maintenance, or participation in an enterprise through a pattern of racketeering activity that is proscribed under that section. Since it is the addition of the "enterprise" concept which distinguishes a RICO prosecution under 18 U. S. C. § 1962 from an ordinary prosecution directed at each of the individual predicated acts which constitute the pattern of racketeering activity, this Court is convinced that the "interest" subject to forfeiture under 18 U. S. C. § 1963(a) is limited to the interest in the enterprise, and does not extend to fruits or profits generated from the enterprise.

For example, in *United States v. Rubin, supra,* the Fifth Circuit was called upon to determine the forfeitability of a union office. In holding the union office to be forfeitable, the Court recognized the holding of said office to be an interest in the enterprise. To reach this conclusion, the Court held that the forfeiture provisions of 18 U. S. C. § 1963 related to the forfeiture of interest "in the enterprise".

> Congress clearly contemplated forfeiture of any ownership or investment type of interest a defendant might hold in an organization he had conducted through a pattern of racketeering activity. It is just such an interest that would not otherwise terminate with incarceration and would enable a defendant and/or his confederates to maintain control of an organization. . . . The Senate Judiciary Committee wrote that the language 'is designed to accomplish a *forfeiture of any interest of any type in the enterprise*'. . . . (Congress) also intended forfeiture fully to serve the broader goal of legally separating persons who run an enterprise through the defined racketeering activity from the enterprise itself.

In addition to the absence of money, profits or proceeds in the wording of 18 U. S. C. § 1963(a)(1), and the express § 1962 enterprise limitation, the legislative history of the enactment of the statute and the interpretation in light thereof indicates that profits were not intended by Congress to be forfeitable under the concept of "interest". *United States v. Marubeni America Corporation, supra.*

The RICO statute was enacted as Title IX of the Organized Crime Control Act of 1970. The purpose of the Bill introduced in the Senate is clearly stated:

> It has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.

S. Rep. No. 91-617, 91st Cong. 1st Sess. 76 (1969).

Recognizing that something more than traditional criminal sanctions were needed to accomplish this objective, Congress included the forfeiture sanction. The Senate Bill, S. 30, as reported by the Committee on the Judiciary, contained a forfeiture provision which was enacted verbatim as 18 U. S. C. § 1963. Compare § 1963(a), Senate Report, supra at 23, with 18 U. S. C. § 1963(a). The Senate Report which accompanied S. 30 explained the penalties provided for in these terms:

> A fine of $25,000 or imprisonment for not more than 20 years is provided for a violation. In addition, provision is made for the criminal forfeiture of the convicted person's *interest in the enterprise* engaged in interstate commerce.

Senate Report, supra at 34 (emphasis added).

This forfeiture of the convicted person's interest in the enterprise is consistent with the stated purpose under

the enactment of the statute. It has the effect of divesting the criminal of his interest in the enterprise, such being the dominant theme in the RICO Act. The forfeiture remedy is clearly keyed to this paramount concept and is designed to separate the criminal from his proprietary interest in the enterprise itself.

The House shared the Senate's view of divestiture. The House Report, made subsequent to the Senate Report, summarized the sanctions for RICO violations in the following language:

> A fine of $25,000, or imprisonment of not more than 20 years is provided for a violation. In addition, provision is made for criminal forfeiture of the convicted person's *interest in the enterprise* engaged in interstate commerce.

H. R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970) reprinted in (1970) U. S. Code Cong. & Ad. News 4007, 4010 (emphasis added).

As a principal sponsor of the Bill, Senator McClellan explained the forfeiture provisions to the House sub-committee as follows:

> **The purpose of Title IX is to fill these gaps in our power to deal with criminal infiltration of legitimate organizations. To the criminal penalties of fine and imprisonment is added the criminal sanction of forfeiture. . . . Title IX would provide an effective adjunct to criminal prosecution: it will punish the criminal appropriately by *forfeiting to the government his ill-acquired interests in a legitimate business*, and directly aid the business community by expelling him from the legitimate business he had abused.**

Hearings on S. 30, and Related Proposals Relating to Control of Organized Crime in the United States Before Sub-

committee 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 55, at 107 (1970) (hereinafter cited as House Hearings) (emphasis added).

Senator McClellan supplemented his testimony before the House Sub-Committee by providing a memorandum underscoring the major provisions of the Bill. In that memorandum, Senator McClellan explained the punitive sanctions and interpreted the forfeiture provision as providing for the following:

> A fine of $25,000 or imprisonment for not more than 20 years is provided for a violation. In addition, provision is made for the criminal forfeiture of the convicted person's *interest in the enterprise* engaged in the interstate commerce.

House Hearings, supra, at 85 (emphasis added).

Other Senators declared the forfeiture provision to apply to the defendant's interest in the enterprise. In doing so, they utilized language clearly indicating that it was a proprietary interest in the enterprise itself that was reached by the forfeiture sections. For example, Senator Byrd, the senior member of the Senate Judiciary Committee, remarked:

> **It is becoming increasingly apparent that such convictions alone, which simply remove leaders from control of syndicated owned enterprises but do not attack the *vested property interests* whose control passes on to other Cosa Nostra leaders are not adequate to demolish the structure of the surviving organizations which they run.**

116 Cong. Rec. 607 (emphasis added).

In a similar vein, Senator Yarbrough stated his view of the forfeiture sanction:

> Along with severe penalties, a unique criminal forfeiture provision will make it possible to divest the racketeer of *any interest he may have obtained in the organization or business.*

116 Cong. Rec. 603 (emphasis added).

The position that the forfeiture sanction is limited to one's interest in the enterprise is further buttressed by reference to a letter sent from Deputy Attorney General Richard Kleindienst to Senator McClellan. In the body of the Senate Report, the criminal forfeiture sanction was explained by reference to a quotation from said letter. In that letter Deputy Attorney General Kleindienst expressed the Justice Department view of the forfeiture provision as follows:

> It is felt that this revival of the concept of forfeiture as a criminal penalty, *limited as it is in § 1963(a) to one's interest in the enterprise* which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than a constitutional power.

Reprinted in Hearings on S. 30. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., at 407 (1969) (emphasis added).

The En Banc court in the pending case rejected the importance of this letter because it believed it to have been taken out of context. Specifically, the En Banc court reasoned that the Kleindienst letter was a response to Congress' question as to the constitutionality of enacting an *in personam* forfeiture statute, and that any reference to the scope of the forfeiture statute was surplusage.

Thus, reasoned the En Banc court, the Kleindienst letter could not be used to establish Congressional intent.

Although the Kleindienst letter was initially submitted as a comment on Senate Bill S. 1861, the letter was subsequently adopted by the Committee and incorporated into Senate Report S. 30. As such, the adoption of the Kleindienst letter indicates Congress' understanding and intent in passing the RICO forfeiture provisions contained in S. 30, 18 U. S. C. § 1963.

Furthermore, Congress explicitly announced the stated purpose and scope of the forfeiture statute: "Section 1963 provides criminal penalties for the violation of Section 1962, above. Sub-section (a) provides the remedy of criminal forfeiture. . . . The language *is designed* to accomplish a forfeiture of any "interest" of any type *in the enterprise* acquired by the defendant or in which the defendant has participated in violation of Section 1962." Senate Report No. 91-617. This express purpose is further quoted in House Report No. 91-1549, which states that RICO calls for forfeiture of interests "in an enterprise".

The limitation of forfeitable interests under 18 U. S. C. § 1963(a)(1) to interests in an enterprise is consistent with the purpose and scope of RICO. As stated in "Forfeiture Under 18 U. S. C. § 1963 - RICO'S Most Powerful Weapon", 17 *American Criminal Law Review* 379 at 380, 385:

> Congress expected forfeiture to play a surgical, not a destructive role in the statutory scheme. Its purpose was to restore victimized commerce to health. . . .
>
> Had Congress intended to provide for the forfeiture of profits, proceeds, goods, or property, it

could have expressed that intent as it did with respect to narcotics violations in another statute. That Congress chose to go so far with respect to narcotics is understandable because the sale of narcotics is an inherently illegal endeavor, and all proceeds or fruits of the endeavor are attributable to illegal conduct. Furthermore, total liquidation of the narcotics endeavor is the ultimate intent of the statutory prohibition. However, with RICO, Congress could not rationally seek forfeiture of all proceeds or fruits of a racketeer-influenced, but otherwise inherently legitimate endeavor. Destruction of the enterprise is not the goal. The income and proceeds may be attributable, at least in part, to the efficacy of the legitimate endeavor, not to the racketeering methods.

Under the Government's interpretation of "interest", forfeiture could result in the dismantling of legitimate business, rather than merely the surgery necessary to revitalize it. The following hypothesis serves to demonstrate the point. Two individuals, over a period of many years, have established a profitable, ongoing, legitimate enterprise. During the course of business, one of the two individuals commits acts which would subject him to RICO prosecution, the second partner remaining unaware and innocent of these crimes. Under this hypothesis, the legitimate business made a total annual profit of $300,000: $200,000 of which was received as a result of the racketeering activity, unbeknownst to the innocent partner. Half of these profits were then reinvested in the ordinary course of business, leaving only $150,000 in liquid assets.

After a successful prosecution, the guilty partner, under 18 U. S. C. § 1963(a)(2) would be required to forfeit his interest in the corporation. In addition, pursuant to the Government's interpretation of "interest" under 18 U. S. C. § 1963(a)(1), the corporation would be required

to forfeit the $200,000 received from racketeering activity, even though its assets totalled only $150,000.

Thus, if 18 U. S. C. § 1963(a)(1) required the forfeiture of all profits or proceeds acquired by the enterprise, it is conceivable that said forfeiture could directly affect the stability of the company by causing extreme economic hardship, or even bankruptcy. Such was not the intent of RICO. Rather, the purpose as previously noted was to excise the criminal element from legitimate business, so that legitimate business could survive. By requiring the guilty partner to relinquish his control of the enterprise, 18 U. S. C. § 1963(a)(2), and by requiring the guilty partner to relinquish his interest in the enterprise, 18 U. S. C. § 1963(a)(1), the legitimate business is given an opportunity to survive without racketeering control or interest.

18 U. S. C. § 1963(a) provides that:

> Whoever violates any provision of Section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962 and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

Clearly, Congress intended 18 U. S. C. § 1963(a)(1) to reach interests independent of those deemed forfeitable under 18 U. S. C. § 1963(a)(2). If "interest" were as all encompassing as suggested by the *en banc* decision below, 18 U. S. C. § 1963(a)(2) would have no meaning indepen-

dent of 18 U. S. C. § 1963(a)(1); all "interest" of any kind would be forfeitable irrespective of whether it offered a source of influence over the enterprise. Such an interpretation, as suggested by the *en banc* court would render 18 U. S. C. § 1963(a)(2) mere surplusage.

What, then, is the distinction between 18 U. S. C. § 1963(a)(1) and 18 U. S. C. § 1963(a)(2)? It is respectfully submitted that the distinction is the difference between mere passive investments and influential control of an enterprise.

18 U. S. C. § 1963(a)(2) clearly relates to interests affording a source of influence over or control of the enterprise. This forfeiture alone, however, does not totally satisfy the purpose of RICO in separating racketeering from legitimate business, since it does not reach *all* investments and ownership in an enterprise. 18 U. S. C. § 1963 (a)(1) fills this void by rendering forfeitable all interests in the enterprise which do not offer such influence or control.

> While 18 U. S. C. §§ 1963(a)(1) and (a)(2) both provide for the forfeiture of an interest in the enterprise, it seems to this Court that § 1963(a)(1) is directed toward the forfeiture of a minority interest in an enterprise controlled by others. 18 U. S. C. § 1963(a)(2), on the other hand, reaches the interest in the enterprise where the defendant is in control, either alone or in conjunction with other defendants.

United States v. Thevis, supra.

Even the *en banc* decision below recognized this distinction in n. 18:

> We note that interests in an enterprise may take varying forms, since they encompasss both ownership

> interests (e. g. stock ownership or real property interests) and interests affording a source of influence over the control of the enterprise.

This concept of 18 U. S. C. § 1963(a)(2) reaching influence and control of the enterprise, while 18 U. S. C. § 1963 (a)(1) reaches passive investments in an enterprise was illustrated in the dissenting opinion below.

> The majority concludes that "reading an enterprise limitation into § 1963(a)(1) renders that section surplusage." I disagree. One example underscores the error in this suggestion. Hypothesize that an individual uses income from racketeering activity to purchase 2% of the stock of a corporation listed on the stock exchange. The investment is totally passive; No element of control or influence envisioned by § 1963(a)(2) is involved. This interest would not be forfeitable under § 1963(a)(2), but it would be forfeitable under § 1963(a)(1) since the acquisition violates § 1962(a). The recognition of an enterprise limitation in § 1963(a)(1) does not, therefore, render that section surplusage.

The scope of RICO reaching passive investments in an enterprise, as well as controlling interests, was recognized by this Court in *United States v. Turkette,* 452 U. S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981):

> RICO also prescribes the investment of income derived from racketeering activity in an enterprise engaged in and which affects interstate commerce as well as the acquisition of an interest in or control or (sic) any such enterprise through a pattern of racketeering activity.

One of the major reasons for the En Banc court's opinion that 18 U. S. C. § 1963(a)(1) reached profits and not interests in the enterprise was the belief that to decide otherwise would relegate violations of 18 U. S. C. § 1962 (c) exempt from forfeiture.

> The cure for these defects in reasoning lies in examination of the effect of § 1963(a)(1) on a § 1962(c) violation. Section 1962(c) makes conducting an enterprise through a pattern of racketeering unlawful. The forfeiture resulting therefrom under § 1963(a)(1) is the interest (or interests) acquired through or as a result of that unlawful conduct. Forfeiture of defendant's interest in the enterprise is governed by the impact of § 1963(a)(1) and (2) upon § 1962 (a) and (b). If § 1962(c) results in any forfeiture at all—and § 1963(a) provides for forfeiture if one violates *any* § 1962 Section—it must provide for forfeiture of something more than § 1962(a) or (b) or be mere surplusage.

It is generally considered that enterprises under 18 U. S. C. § 1962(a) and (b) are legally recognized enterprises or companies. 18 U. S. C. § 1962(c) relates to both employees of enterprises and companies who do not have investment interests and to what is generally recognized to be enterprises in fact. Thus, a group of individuals who violate the dictates of the RICO statute may themselves be the illegal enterprise under 18 U. S. C. § 1962(c). *United States v. Turkette, supra.* It was the En Banc court's dilemma in cases of enterprises in fact under 18 U. S. C. § 1962(c), that there appears little that is subject to forfeiture other than profits.

This dilemma was not unrecognized by both Congress and the Justice Department when they sought enactment of the RICO statute. As stated in the dissenting opinion in the case below, "I am cognizant that this conclusion occasions problems with respect to associations in which one cannot own a legal interest, as in the case *sub judice.* This limitation was recognized by the Justice Department in its comments on the legislation when it observed that

'there is often nothing to forfeit . . . in the case of individuals associated in fact.'"

This does not mean, however, that there are no interests in the enterprise which may be forfeited in cases involving enterprises in fact, since forfeitable interests do exist.

As stated in *United States v. Thevis, supra*:

> In the case at bar, the enterprise is an association, an organization, absent statutory intervention, incapable of holding property in its own right. Nevertheless, the defendants have allegedly furthered the goal of the enterprise by placing property which they held in their individual or corporate capacities under the control of the association so that the association could achieve their jointly held goals.
>
> Like an investment in the stock of a corporation or a capital interest in a partnership, a person's informal contribution of property to an association is an interest in that association subject to forfeiture under 18 U. S. C. § 1963 (a) (2), since the contributed property has been put at the risk of the association's success. It is an investment in the success of the association, just as surely as a purchase of stock in a corporation or a contribution of capital to a partnership. . . .
>
> The statute requires forfeiture of his interest—that is the property which the defendant contributed to the enterprise to forward its goals and the defendant's interest in the undistributed profits of the enterprise.

For example, in *United States v. Godoy, supra,* the Court was called upon to recognize an association in fact under 18 U. S. C. § 1962(c). Certain monies were made by the criminal enterprise through a pattern of racketeer-

ing. Some profits were invested by the enterprise in fact, through the purchase of real estate; other profits were distributed to the defendant, who invested same in a personal residence.

The Government conceded that the profits which had been distributed to the individual defendant and thereafter personally invested in residential property was not forfeitable under RICO since said property was not an interest in the enterprise. The Government did, however, seek forfeiture of the income-producing real estate under 18 U. S. C. § 1963(a)(1) in that said real estate investments were an "interest in any enterprise".

The Court concluded that distributed profits of an illegal enterprise were not forfeitable under the express wording of 18 U. S. C. § 1963(a)(1) and (2). Rather, the Court recognized that, "such proceeds have to be invested in an enterprise before they can be forfeited". The income-producing real estate was purchased on behalf of the criminal enterprise and, as such, was an asset of said enterprise from which the guilty defendants must be separated. Since the enterprise in fact owned investments, as opposed to the individuals, the interests of the enterprise in fact were subject to forfeiture.

Thus, the Ninth Circuit in *United States v. Godoy, supra,* and *United States v. Marubeni America Corporation, supra,* have recognized the relationship between 18 U. S. C. § 1962(c) and 18 U. S. C. § 1963(a)(1). Profits of an illegal enterprise in fact, which have been distributed to the individual members, are not forfeitable, since they are not an interest in the enterprise. However, assets belonging to the enterprise, including investments, are for-

feitable interests. It is only the forfeiture of all assets of an enterprise in fact which will successfully terminate an individual's relationship with the entity and meet the Congressional intent of total divestment.

What, then, is the legal relationship between 18 U. S. C. §§ 1962 and 1963 pertaining to forfeitable "interest"? A guide through the labyrinth would be as follows: 18 U. S. C. § 1962(a) and (b) relate to enterprises in law, while 18 U. S. C. § 1962(c) relates to employees in enterprises in law and to enterprises in fact. 18 U. S. C. § 1963(a)(2) provides for the forfeiture of active investments and interests obtained by enterprises in law in which either a controlling interest or over one per cent investment has been obtained. 18 U. S. C. § 1963(a)(1) provides for the forfeiture of passive investments and interests obtained by enterprises in law in which neither a controlling interest nor over one per cent investment has been obtained. In addition, 18 U. S. C. § 1963(a)(1) provides for the forfeiture of interests in the enterprise obtained by enterprises in fact, such as real estate and other investments. 18 U. S. C. § 1963(a)(1), being limited to interests in the enterprise and to individual members' interest in said enterprise, does not extend to profits or dividends which have been distributed and over which the enterprise has no control.

The following hypothesis serves to exemplify what may or may not be forfeitable under each type of RICO prosecution. The first example relates to violations of 18 U. S. C. § 1962(a), (b), and (c), and forfeitable interests under 18 U. S. C. § 1963(a)(1) and (2):

Legitimate Drug Manufacturers, Inc. was in the lawful business of manufacturing Methaqualone. An inde-

pendent conspiracy was formed between a Vice President, an employee, and a stockholder of the company. The object of this conspiracy was to sell the legitimately manufactured Methaqualone of Legitimate Drug Manufacturers, Inc. to the "black market". To hide their illegal activities, the three conspirators funnelled part of their profit through the books of Legitimate Drug Manufacturers, Inc. These channelled profits amounted to substantial income to Legitimate Drug Manufacturers, Inc.

The three co-conspirators were indicted and convicted of violating 18 U. S. C. § 1962. In particular, the Vice President was convicted of having an "interest or control of any enterprise" in violation of 18 U. S. C. § 1962(b). The employee was convicted of being "employed by or associated with any enterprise", in violation of 18 U. S. C. § 1962(c). The stockholder was convicted of investing "any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise" in violation of 18 U. S. C. § 1962(a).

In ordering the divestment of each co-conspirator's interest in the enterprise, the Court would be required to utilize both 18 U. S. C. §§ 1963(a)(1) and (2). The Vice President would forfeit his job with Legitimate Drug Manufacturers, Inc. under 18 U S. C. § 1963(a)(2), since his position afforded him "a source of influence over" the enterprise. The employee would forfeit his job under 18 U. S. C. § 1963(a)(1), since his position amounted to an interest in the enterprise. The stockholder would forfeit his stock and ownership rights in Legitimate Drug Manufacturers, Inc., under 18 U. S. C. § 1963(a)(2) if his interest were in an amount "affording a source of influence"

and under 18 U. S. C. § 1963(a)(1) if his interest were in an amount not affording such an influence.

The forfeiture of proceeds would not be required, since such would not serve the purpose of RICO. The termination of the three co-conspirator's relationship with Legitimate Drug Manufacturers, Inc. would sufficiently surgically remove the racketeer influence from an otherwise legitimate business.

The second fact scenario involves violations of 18 U. S. C. § 1962(b) and (c) and forfeitable interests under 18 U. S. C. § 1963(a)(1). Three individuals form a conspiracy to illegally manufacture Methaqualone. Rather than calling these individuals by name, their enterprise shall be loosely referred to as Illegitimate Drug Manufacturers. As members of an enterprise or association in fact, Illegitimate Drug Manufacturers purchases land, buildings, equipment, chemicals, and trucks, all utilized in the building of a secret Methaqualone factory. Some of the profits of this illegal association are placed in a joint bank account used for the benefit of the enterprise. Other profits are invested in income-producing property on behalf of the enterprise. The remaining profits are distributed to the individual members of the association, who then invest personally in such items as residential houses.

The three co-conspirators were then indicted and convicted of violating 18 U. S. C. § 1962(b) and (c), relating to enterprises or associations in fact.

In ordering the divestment of each co-conspirator's interest in the enterprise, the Court would utilize 18 U. S. C. § 1963(a)(1). All land, equipment and property which

had been purchased on behalf of the enterprise and in furtherance of the enterprise, although actually purchased by the individuals, would be forfeitable as an interest in the enterprise. Likewise, the assets of the enterprise would be forfeitable. This would include the joint bank account, undistributed pro[illegible] and investment income-producing property, which would otherwise inure to the benefit of the enterprise.

As previously noted, a defendant may be separated from enterprises at law by forfeiting his ownership and interests therein; the legitimate business is entitled to survive independent of the defendant's racketeering. Such is not the case in enterprises in fact. Since there is no legitimacy to the association, the enterprise in its entirety must be eliminated to serve Congressional intent. To do so, any interest of the enterprise, since none is legitimate, is forfeitable.

On the other hand, since distributed profits are not forfeitable, those monies which were given to the individuals and thereafter invested by the individuals no longer belong to the enterprise. Since the enterprise no longer has control over these assets, they are not interests in the enterprise.

The third example also relates to violations of 18 U. S. C. § 1962(b) and (c), and forfeitable interests under 18 U. S. C. § 1963(a)(1). Under this hypothesis, three co-conspirators agree to violate RICO through the sale of Methaqualone. No property or equipment is purchased by the enterprise to further its interests. Some of the profits and proceeds are invested in income-producing property on behalf of all members of the enterprise. Other

profits and income are distributed to the individual members.

The three co-conspirators were indicted and convicted of violating 18 U. S. C. § 1962(b) and (c) in that they engaged in racketeering through an enterprise in fact. Forfeiture would be required under 18 U. S. C. § 1963(a)(1) of the investments which were made by and/or on behalf of the enterprise. Such forfeiture would totally eliminate the existence of the enterprise, as intended by Congress. The distributed proceeds, which no longer were an asset of the enterprise, would not be forfeitable.

This analysis of 18 U. S. C. §§ 1962 and 1963 is mandated by the express statutory wording and by the accompanying legislative history and intent. In fact, it is only this analysis which gives full meaning to each statutory subsection, thus rendering no portion of the RICO statute mere surplusage.

The Government's argument for the forfeiture of proceeds stems from their belief that an enterprise limitation on forfeitable "interest" would result in no forfeiture in the case at bar. The defendant herein was charged with violating RICO through a series of arsons. Specifically, the Government alleged that the defendant and others maintained or purchased property which was burned after being over-appraised and insured. The insurance proceeds were distributed directly to the individual members of the conspiracy as personal assets. It is these proceeds for which the Government seeks forfeiture, since, according to the prosecution and the Court below, there is nothing else to forfeit.

Yet, there were interests in the enterprise which were forfeitable. As previously noted, any property or assets

which are brought to the enterprise by an individual for the purpose of furthering the enterprise become assets of the enterprise. *United States v. Thevis, supra; United States v. Godoy, supra;* and *United States v. Marubeni America Corporation, Inc., supra.* In an arson-ring conspiracy, the assets which were purchased or contributed by the individual members in furtherance of the enterprise were the buildings to be burned. Although the Government sought this forfeiture against defendant Russello, a Motion for Judgment of Acquittal was granted by the trial court. (R. Vol. 70, pages 172-3). This Court should not be misled into requiring the forfeiture of distributed proceeds, when such is neither required by the express wording of the statute nor by Congressional intent, simply because that which is forfeitable herein (the land and buildings) was not so ordered by the trial court.

That is not to say, that the criminal should be entitled to benefit from his "ill-gotten gains". Nor does the RICO statute mandate such a conclusion. Rather, its provisions serve the purpose intended, to revitalize legitimate business.

To this end, Congress has imposed strict civil sanctions against racketeers in favor of legitimate business. 18 U. S. C. § 1964(c) provides that, "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Thus, in order to further the purposes of RICO in removing racketeer influence from legitimate businesses

and in aiding the rejuvenation and survival of such legitimate businesses, Congress authorized injured parties to recover the "ill-gotten gains" of the racketeer rather than requiring the forfeiture of said proceeds to the Government. And to further punish the racketeer, said recovery is permitted threefold.

Lastly, it must be noted that there is nothing prohibiting Congress from authorizing criminal forfeiture of distributed proceeds. In fact, Congress may ultimately wish to seek the forfeiture of profits and proceeds, as have many of the state legislatures. However, such a policy determination should be made at first instance by the legislature. As noted in the dissent below:

> The Court today concludes that the word "interest", as here used, includes income or profits derived from a pattern of racketeering activity. I do not share that conclusion, adhering to the view expressed in the panel opinion that the term "interest", as used in § 1963(a)(1) applies only to an interest in the enterprises envisioned in §§ 1962(a)(b) and (c) and not to income derived from illegal activity. Whether this distinction is wise, prudent, or appropriate is, as I perceive it, a matter best left to the legislative branch, for it represents a significant policy decision.

Congress, since the passage of 18 U. S. C. §§ 1961 etc. has apparently recognized the possibility of profits and proceeds being a desirable interest to be forfeited in RICO prosecutions. *See, Weiner, Crime Must Not Pay:* RICO Criminal Forfeiture in Perspective, 1 N. Ill. L. R. 226, 243 (1981) (article written by Edward C. Weiner, Deputy Director, Office of Economic Crime Enforcement, United States Department of Justice).

For example, H. R. 4110 was introduced in the First Session of the 97th Congress. H. R. 4110 would have

amended 18 U. S. C. § 1963 to include the additional forfeiture of profits and proceeds upon being convicted of racketeering:

> (b) *In addition* to any other penalties prescribed by this section, whoever violates any provision of section 1962 shall forfeit to the United States (1) any profits and proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained in violation of section 1962, and (2) any profits and proceeds, regardless of the form in which held, that are acquired, indirectly or directly, as a result of a violation of section 1962.
>
> (c) Assets forfeitable under this section include those interests, proceeds, or profits owned by an individual convicted of violating section 1962 and acquired by him, indirectly or directly, through the use of an illegitimate enterprise or illicit association, or through a combination of individuals.
>
> (d) To the extent that assets, interests, profits, and proceeds forfeitable under this section—
>
> (1) cannot be located;
>
> (2) have been transferred, sold to, or deposited with third parties; or
>
> (3) have been placed beyond the jurisdiction of the United States,
>
> the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsections (a) and (b) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection provided the assets described in subsections (a) and (b) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.

A similar Bill was introduced before the Senate in the Second Session of the 97th Congress, S. 2320. The purpose of this legislation was, "to amend section 1963 of Title 18, United States Code, . . . to provide for the criminal forfeiture of the proceeds of racketeering activity. . . ." In part, S. 2320 would have amended 18 U. S. C. § 1963 to read as follows:

> (a) Whoever violates any provision of section 1962 of this chapter—
>
> (1) shall be fined not more than $25,000 or imprisoned for not more than twenty years, or both; and
>
> (2) shall forfeit to the United States any property, irrespective of any provision of State law—
>
> (A) constituting, or derived from, any interest in or contribution to an enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 of this chapter;
>
> (B) constituting a means by which he has exerted influence or control over any enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the acquisition, maintenance, establishment, operation, conduct or control of, in violation of 1962 of this chapter; and
>
> (C) constituting, or derived from, any proceeds which he obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 of this chapter.
>
> The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pur-

suant to this section, that he forfeit to the United States all property described in paragraph (2).

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities including, but not limited to—

(A) any position, office, appointment, tenure, commission, or employment contract of any kind which the incumbent acquired or maintained in violation of section 1962 of this chapter, through which the incumbent conducted, or participated in or facilitated the conduct of, the affairs of an enterprise in violation of Section 1962 of this chapter, or which afforded the incumbent a source of influence or control over the affairs of an enterprise which was exercised in violation of section 1962 of this chapter;

(B) any compensation, right or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in subparagraph (A) which the incumbent obtained, directly or indirectly, through a pattern of racketeering activity or unlawful debt collection in violation of section 1962 of this chapter, or which accrued to the incumbent during the period that he controlled, influenced, conducted, or participated in or facilitated the conduct of, the affairs of the enterprise in violation of section 1962 of this chapter; and

(C) any amount payable or paid under any contract for goods or services which was awarded or performed through a pattern of racketeering activity or unlawful debt collection.

(c) All right, title, and interest in property described in subsection (a)(2) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be the subject of special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: *Provided*, that the Attorney General shall not direct disposition of any such property if the person establishes to the Attorney General by evidence contained in a petition pursuant to subsection (h) that—

(1) he was a bona fide purchaser of the property for value; and

(2) he was reasonably without cause to believe that the property was of the type described in subsection (a)(2).

(d) If any of the property described in subsection (a) (2)—

(1) cannot be located,

(2) has been transferred to, sold to, or deposited with, a third party,

(3) has been placed beyond the jurisdiction of the court,

(4) has been substantially diminished in value by any act or omission of the defendant, or

(5) has been commingled with other property which cannot be divided without difficulty,

> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5). . . .

It is important to note that H. R. 4110 and S. 2320 re-evaluated the entire concept of criminal forfeiture in racketeering cases. In addition to attempting to expand RICO forfeitures to profits and proceeds, specific provisions were included for the protection of third parties and legitimate business. Congress recognized that a wholesale extension of RICO forfeiture to profits and proceeds would injure innocent parties unless specific protections were afforded.

Another example of Congress' awareness that profits and proceeds were not subject to forfeiture under the RICO statutes as originally enacted is H. R. 2646. In H. R. 2646, the House sought, "to provide that certain profits or proceeds of persons convicted of racketeering offenses involving violations of drug law are subject to forfeiture".

> (3) in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, any proceeds or profits derived from any interest, security, claim or property or contractual right, described in clause (1) or (2) of this subsection.

This attempt to seek forfeiture of profits and proceeds in only drug-based RICO prosecutions is a clear recognition that the statute, as presently written, is not so all-encompassing. Clearly, Congress' intent in seeking passage of H. R. 2646 was to extend the scope of RICO

forfeiture to drug cases, not to eliminate the forfeiture of profits and proceeds in all but drug cases.

Moreover, this attempted treatment of drug cases indicates Congress' conscious awareness of the distinction between drug and other forms of racketeering. The distinction between the goal in drug-related cases being the elimination of illegal profits and the goal in other forms of racketeering cases being the elimination of investment, control and influence in legitimate business, is the same conceptual difference recognized by Congress in 1969 in originally specifying profit and proceeds forfeitures upon conviction of a Continuing Criminal Enterprise and not RICO.

Thus, this current legislation indicates Congress' inability to conclusively decide whether it wishes to seek forfeiture of all proceeds, some proceeds, or any proceeds upon conviction of racketeering. This significant policy decision should be left to the legislative branch for final determination.

In conclusion, the petitioner would respectfully submit that 18 U. S. C. § 1963(a)(1) is limited to interests in the enterprise. Such an interpretation is supported by the express wording of the statute. An all-encompassing definition of "interest", as suggested by the Government, would render 18 U. S. C. § 1963(a)(2) mere surplusage. Moreover, the legislative intent and history of the RICO statute, the companion Continuing Criminal Enterprise statute, and subsequent proposed legislations indicate the policy distinctions between drug forfeitures and RICO forfeitures. Specifically, the goal of forfeitures under C. C. E. is to confiscate the illegal profit. The goal

of forfeitures under RICO, on the other hand, is the rejuvenation of legitimate business through the exorcism of racketeering. The scope of RICO forfeiture should be extended only by Congressional decree.

CONCLUSION

For the above cited cases, authorities, reasons and theories, it is respectfully requested that this Honorable Court reverse the judgment and order of forfeiture entered below.

Respectfully submitted,

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APPENDIX

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall b nlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962 [18 USCS § 1962], and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962].

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs, laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereon, such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter [18 USCS §§ 1961 et seq.] by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions

on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

§ 848. Continuing criminal enterprise

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this title or title III the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 of the United States Code and the Act of July 15, 1932 (D. C. Code, secs. 24-203-24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a)) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

(Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 408, 84 Stat. 1265.)

97TH CONGRESS
1ST SESSION

H. R. 4110

To improve the effectiveness of criminal forfeiture, and for other purposes

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IN THE HOUSE OF REPRESENTATIVES

JULY 9, 1981

Mr. ZEFERETTI introduced the following bill; which was referred jointly to the Committees on the Judiciary and Energy and Commerce

---

A BILL

To improve the effectiveness of criminal forfeiture, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Forfeiture Amendments Act of 1981".

SEC. 2. Section 1963 of title 18, United States Code, is amended—

(1) by redesignating subsections (b) and (c) as subsections (e) and (f); and

(2) by inserting after subsection (a), the following new subsections:

"(b) In addition to any other penalties prescribed by this section, whoever violates any provision of section 1962 shall forfeit to the United States (1) any profits and

proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained in violation of section 1962, and (2) any profits and proceeds, regardless of the form in which held, that are acquired, indirectly or directly, as a result of a violation of section 1962.

"(c) Assets forfeitable under this section include those interests, proceeds, or profits owned by an individual convicted of violating section 1962 and acquired by him, indirectly or directly, through the use of an illegitimate enterprise or illicit association, or through a combination of individuals.

"(d) To the extent that assets, interests, profits, and proceeds forfeitable under this section—

"(1) cannot be located;

"(2) have been transferred, sold to, or deposited with third parties; or

"(3) have been placed beyond the jurisdiction of the United States,

the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsections (a) and (b) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsections (a) and (b) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court."

SEC. 3. (a) Section 408 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Public Law 91-513, 21 U. S. C. 848) is amended—

(1) in subsection (a)(1) by striking "in paragraph (2)" and inserting in lieu thereof the following: "by this section";

(2) in subsection (a)(2)(A) by adding after the phrase "the profits obtained by him in such enterprise" the following: ", including any profits and proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained, indirectly or directly, in connection with or as a result of a violation of paragraph (1)"; and

(3) by adding the following new subsection after subsection (d):

"(e) To the extent that assets, interests, profits, and proceeds forfeitable under this section—

"(1) cannot be located;

"(2) have been transferred, sold to, or deposited with third parties; or

"(3) have been placed beyond the territorial jurisdiction of the United States.

the court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under subsection (a) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection, provided the assets described in subsection (a) are surrendered or otherwise remitted by such defendant to the jurisdiction of the court.".

Calendar No. 749

97TH CONGRESS
2D SESSION

S. 2320 (Partial Excerpt)

[Report No. 97-520]

To amend section 1963 of title 18, United States Code, and the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U. S.C. 801 et seq.) to provide for the criminal forfeiture of the proceeds of racketeering activity, to provide for the sanction of criminal forfeiture for all felony drug offenses, to facilitate forfeitures in drug related and racketeering cases, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 31 (legislative day, FEBRUARY 22), 1982

Mr. THURMOND (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

AUGUST 10 (legislative day, JULY 12), 1982

Reported by Mr. THURMOND, without amendment

A BILL

To amend section 1963 of title 18, United States Code, and the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U. S. C. 801 et seq.) to provide for the criminal forfeiture of the proceeds of racketeering activity, to provide for the sanction of criminal forfeiture for all felony drug offenses, to facilitate forfeitures in drug related racketeering cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Comprehensive Criminal Forfeiture Act of 1982".

PART A

SEC. 101. Section 1963 of title 18, United States Code, is amended to read as follows:

"§ 1963, Criminal penalties.

"(a) Whoever violates any provision of section 1962 of this chapter—

"(1) shall be fined not more than $25,000 or imprisoned for not more than twenty years, or both; and

"(2) shall forfeit to the United States any property, irrespective of any provision of State law—

"(A) constituting, or derived from, any interest in or contribution to an enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 of this chapter;

"(B) constituting a means by which he has exerted influence or control over any enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the acquisition, maintenance, establishment, operation, conduct or control of, in violation of section 1962 of this chapter; and

"(C) constituting, or derived from, any proceeds which he obtained, directly or indirectly,

from racketeering activity or unlawful debt collection in violation of section 1962 of this chapter.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this section, that he forfeit to the United States all property described in paragraph (2).

"(b) Property subject to criminal forfeiture under this section includes—

"(1) real property, including things growing on, affixed to, and found in land; and

"(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities including, but not limited to—

"(A) any position, office, appointment, tenure, commission, or employment contract of any kind which the incumbent acquired or maintained in violation of section 1962 of this chapter, through which the incumbent conducted, or participated in or facilitated the conduct of, the affairs of an enterprise in violation of section 1962 of this chapter, or which afforded the incumbent a source of influence or control over the affairs of an enterprise which was exercised in violation of section 1962 of this chapter;

"(B) any compensation, right or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in subparagraph (A) which the incumbent obtained, directly or indirectly, through a pattern of racketeering activity or unlawful debt collection in

violation of section 1962 of this chapter or which accrued to the incumbent during the period that he controlled, influenced, conducted, or participated in or facilitated the conduct of, the affairs of the enterprise in violation of section 1962 of this chapter; and

"(C) any amount payable or paid under any contract for goods or services which was awarded or performed through a pattern of racketeering activity or unlawful debt collection.

"(c) All right, title, and interest in property described in subsection (a)(2) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: *Provided,* That the Attorney General shall not direct disposition of any such property if the person establishes to the Attorney General by evidence contained in a petition pursuant to subsection (h) that—

"(1) he was a bona fide purchaser of the property for value; and

"(2) he was reasonably without cause to believe that the property was of the type described in subsection (a)(2).

"(d) If any of the property described in subsection (a)(2)—

"(1) cannot be located,

"(2) has been transferred to, sold to, or deposited with, a third party,

"(3) has been placed beyond the jurisdiction of the court,

"(4) has been substantially diminished in value by any act or omission of the defendant, or

"(5) has been commingled with other property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5). . . .

97TH CONGRESS
1ST SESSION

H. R. 2646

To amend section 1963 of title 18 of the United States Code to create a rebuttable presumption about the forfeiture of property of persons convicted of racketeering offenses involving violation of drug laws, to provide that the property forfeited in connection with such racketeering offenses, and the proceeds from such property, be used for local, State, and Federal drug law enforcement, and to provide that certain profits or proceeds of persons convicted of racketeering offenses involving violations of drug law are subject to forfeiture.

IN THE HOUSE OF REPRESENTATIVES

MARCH 19, 1981

Mr. SAWYER introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend section 1963 of title 18 of the United States Code to create a rebuttable presumption about the forfeiture of property of persons convicted of racketeering offenses involving violation of drug laws to provide that the property forfeited in connection with such racketeering offenses and the proceeds from such property be used by local State, and Federal drug law enforcement, and to provide that certain profits or proceeds of persons convicted of racketeering offenses involving violations of drug law are subject to forfeiture.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1963 of title 18 of the United States Code is amended—

(1) in subsection (a)—

(A) by striking out "and" immediately before "(2)"; and

(B) by striking out the period at the end and inserting in lieu thereof the following: ", and (3) in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, any proceeds or profits derived from any interest, security,

claim, or property or contractual right, described in clause (1) or (2) of this subsection.";

(2) in subsection (c), by striking out the period at the end and inserting in lieu thereof the following: ", except that the Attorney General, may in his discretion, provide for the use of any such property forfeited in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, for Federal drug law enforcement or the improvement of State and local drug law enforcement. There is hereby appropriated, to remain available until expended, for each fiscal year beginning after the date of the enactment of this sentence a sum equal to the proceeds from the disposition during the immediately preceding fiscal year of all such property forfeited in cases in which the racketeering activity consisted of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, to be used in the discretion of the Attorney General for Federal drug law enforcement and the improvement of State and local drug law enforcement."; and

(3) by adding at the end the following new subsection:

"(d) If the racketeering activity consists of any offense involving dealing in narcotic or other dangerous drugs, which is chargeable under State law or any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, it shall be presumed that all assets or other property of the convicted person are subject to forfeiture under this section, unless such convicted person proves otherwise by the preponderance of the evidence.".

Office - Supreme Court, U.S.
FILED
MAY 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-472

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. RUSSELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether profits and proceeds derived from racketeering activity constitute an "interest" within the meaning of 18 U.S.C. 1963(a)(1) and are therefore subject to forfeiture.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-472

JOSEPH C. RUSSELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 77-109) is reported at 681 F.2d 952. The panel opinion is reported at 648 F.2d 367.[1]

JURISDICTION

The judgment of the en banc court of appeals (J.A. 100) was entered on August 2, 1982. The petition for a writ of certiorari was filed on September 9, 1982, and granted on January 10, 1983 (J.A. 110). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth in an appendix to this brief.

[1] The portion of the panel opinion relating to the forfeiture issue (J.A. 64-69) appeared in the advance sheets (648 F.2d at 407-409) but was deleted after rehearing was granted.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and 15 others were convicted of racketeering, conspiracy, and mail fraud, in violation of 18 U.S.C. 1341, 1962(c) and (d). After returning the verdicts on the criminal charges, the jury returned special verdicts requiring the forfeiture, pursuant to 18 U.S.C. 1963(a), of four payments made to petitioner by his insurance company, totalling $340,043.09 (J.A. 54-57).[2] The district court then entered a judgment of forfeiture against petitioner in that sum (*id.* at 58-60). A panel of the court of appeals affirmed petitioner's convictions but reversed the forfeiture (*id.* at 64-69).[3] The full court thereupon ordered rehearing en banc on the forfeiture issue and vacated that portion of the panel opinion (*id.* at 73-74). The en banc court then affirmed the district court's judgment of forfeiture (*id.* at 77-109).

1. The proof at trial is described in the opinions of the panel (648 F.2d 367, 378-380, 409-411 (1981); J.A. 69-72) and the en banc court (681 F.2d 952, 953 (1982); J.A. 80-81). The evidence established that petitioner and his co-defendants formed an association-in-fact that operated in Tampa and Miami, Florida, from 1973 to 1976 and engaged in numerous acts of arson for the purpose of defrauding insurance companies. In the beginning, the arsonists

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[2] These verdicts related to count two of the indictment (J.A. 37-47).

[3] The panel affirmed petitioner's convictions on two counts of mail fraud, conspiracy to violate the RICO statute, and a substantive RICO violation (*United States* v. *Martino*, 648 F.2d 367 (5th Cir. 1981)), and this Court denied certiorari, No. 81-1485 (Apr. 26, 1982).

set fire to buildings already owned by those associated with the enterprise. The owners then filed inflated proof of loss statements, collected the insurance proceeds, and made payments to other members of the arson ring. Later, ring members purchased buildings, obtained insurance in excess of the buildings' value, and after the arson took place, submitted insurance claims and divided the proceeds. One member of the ring was a corrupt insurance adjuster who processed fire loss claims even though he knew that the fires had been deliberately set. He also directed ring members to insurance agencies where they could obtain fire insurance in excess of the value of substandard buildings. Several of those associated with the enterprise were responsible for setting the fires. Others, including a realtor, located property to be bought and burned and also arranged loans for the purchase of such buildings.

Petitioner was the owner of the Central Professional Building in Tampa. His building consisted of two sections—an original, smaller section in the front and a newer addition in the rear. The rear, which was completed in the summer of 1975, contained apartments, offices, and parking facilities. Petitioner arranged for two arsonists to set fire to the front portion of the building. He intended to use the insurance proceeds to rebuild that section, which was less profitable than the newer, rear part of the building (50 Tr. 250; 56 Tr. 96-97). Contrary to his plan, however, the fire spread to the rear of the building and endangered the lives of several tenants who worked and resided there (50 Tr. 272, 273; 67 Tr. 24, 53; 74 Tr. 32-35, 54-58, 63-67). Joseph Carter, another member of the arson ring, was the insurance adjustor for petitioner's claim and helped petitioner to obtain the highest payment possible. Petitioner col-

lected $340,043.09 in insurance proceeds and paid Carter $30,000 for his assistance (50 Tr. 276; 56 Tr. 104-107).

2. In initially reversing the judgment of forfeiture (J.A. 64-69), a panel of the court of appeals found that "Congress did not intend to include in the forfeiture provision of § 1963 the fruits and profits obtained from a pattern of racketeering activity" (*id.* at 67). The en banc court of appeals disagreed and reinstated the forfeitures (*id.* at 77-109).

The en banc court first noted (J.A. 81-83) that racketeering profits fall within the plain meaning of Section 1963(a)(1), which calls for the forfeiture of "any interest * * * acquired or maintained in violation of section 1962." Rejecting the argument that Congress intended to reach only interests in an enterprise, the court noted (J.A. 82) that such a limitation was omitted from Section 1963(a)(1) but was expressly included in other provisions of the statute, including Section 1963(a)(2).

The court found support for its interpretation in legislative history showing that Congress intended to create a broad forfeiture penalty and to remove the profit from organized crime (J.A. 87-95). From the congressional debates, the court concluded (*id.* at 90) that "the target of Congress'[s] attack included racketeering operations in which the chief type of property interest obtained by organized crime would be something other than an ownership or proprietary interest." The court cited references to the very type of activity involved in this case—arson committed for purposes of insurance fraud—as well as references to narcotics trafficking, loan sharking, extortion, gambling, and prostitution (*id.* at 90-91). The court also noted Congress's expressed desire to combat organized crime's practice of infiltrating and then "bleed[ing]" the assets of legitimate businesses (*id.* at 90).

The court observed (J.A. 91) that unless racketeering profits were subject to forfeiture, the forfeiture provisions would be of little use in combating enterprises devoted exclusively to criminal ends, since such enterprises seldom issue stock or hold property in their own names. The court found further support for its interpretation in the fact that, "after extensive legislative work," Congress adopted Section 1963(a) in its present form rather than an earlier version that reached only interests in an enterprise (J.A. 92-93).

Acknowledging that its decision conflicted with *United States* v. *Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980), the court explained why it disagreed with *Marubeni*'s reasoning. The *Marubeni* court relied upon Section 1962(a), which makes it a crime to invest racketeering income in enterprises engaged in or affecting interstate commerce. Since that provision contains an exception for most open-market purchases of not more than 1% of an enterprise's stock, the Ninth Circuit reasoned (611 F.2d at 767) that "Congress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used." Rejecting this analysis, the court in this case found (J.A. 96-97) no inconsistency between the decision not to criminalize such investments and the intent to make such ill-gotten gain nevertheless subject to forfeiture.

The *Marubeni* court also relied (611 F.2d at 766 n.7) upon 21 U.S.C. 848(a)(2)(A), which was enacted at approximately the same time as 18 U.S.C. 1963 and expressly provides for the forfeiture of "profits" from certain illegal drug-related activities. The court of appeals in the present case observed that Congress might well have used the more specific term

"profits" in 21 U.S.C. 848(a)(2)(A) because drug dealing "typically involves cash transactions" (J.A. 97-98). By contrast, the court reasoned (*id.* at 98), since the fruits of racketeering may take a greater variety of forms, use of the more general term "interest" was entirely appropriate.

The dissenters agreed with petitioner that Section 1963(a)(1) is restricted to interests in an enterprise. Beginning from the premise (J.A. 101) that "historically our society has abhorred forfeitures," they contended that the scope of Section 1963(a)(1) "is to be most charily assessed." They argued (J.A. 103) that Section 1963(a)(1) relates to interests in a business acquired or maintained in violation of Section 1962(a) and (b), while Section 1963(a)(2) "relates primarily to an interest in an enterprise which is involved in conduct violative of § 1962(c)." They also relied (J.A. 104) upon the fact that in other provisions of the RICO statute the term "interest" is expressly limited to interests in an enterprise. And they found support for their interpretation in portions of the legislative history (*id.* at 105-106) and in Congress's use of the term "profits" in 21 U.S.C. 848(a)(2) (J.A. 107).

SUMMARY OF ARGUMENT

The issue in this case is whether profits and proceeds derived from racketeering constitute an "interest" within the meaning of 18 U.S.C. 1963(a)(1) and are thus subject to criminal forfeiture. Despite the congressional mandate that the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. V) 1961-1968, is to be liberally construed by the courts to effectuate its broad remedial purposes, and the undeniable fact that forfeiture of racketeering booty is one of the most promising means of

discouraging the kinds of organized criminal activity at which the statute seeks to strike, the dissenters below nevertheless erected their analysis on the premise that our society abhors forfeitures, and therefore that forfeiture provisions are to be strictly and narrowly construed (J.A. 101). Whatever truth there may have been to this maxim in the past, it is plain that over the last 15 years Congress has come increasingly to view forfeitures as an essential weapon in the battle against crime. It would therefore be more apt today to say that forfeitures are a preferred means of combatting criminal activity. Putting aside the overriding hostility to forfeitures that colored the dissent's view of the scope of Section 1963(a)(1), it becomes clear from the plain meaning of that provision and its structure and legislative history that forfeitures of racketeering proceeds are authorized.

1. Section 1963(a)(1) provides without qualification that upon conviction a racketeer must forfeit "*any interest* he has acquired or maintained in violation of section 1962" (emphasis added). Racketeering profits and proceeds fall within the ordinary meaning of "any interest" and are therefore forfeitable. The term interest has been defined as "[t]he most general term that can be employed to denote a right, claim, title or legal share in something" (*Black's Law Dictionary* 729 (rev. 5th ed. 1979)). Consistent with that definition, this Court's decisions concerning the meaning of the word "property" in the Due Process Clause make clear that the term interest comprehends all types of real and personal property, as well as other forms and sources of wealth and power. This Court has stated that " '*property' denotes a broad range of interests* that are secured by 'existing rules or understanding' " (*Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972) (emphasis added)),

and has also observed (*Board of Regents* v. *Roth*, 408 U.S. 564, 571-572 (1972) (emphasis added; footnote omitted)) that "*the property interests* protected by procedural due process *extend well beyond actual ownership of real estate, chattels, or money.*" Congress undoubtedly employed the term "interest" in Section 1963(a)(1), rather than using the term "property" or attempting to enumerate all those things subject to forfeiture, because it wanted to strike as broadly as possible at the illicit fruits of racketeering.

Petitioner has not attempted to define an "interest" but insists that the term is limited to an interest in an enterprise because " '[i]nterest', by definition, includes of necessity an interest in something" (Pet. Br. 9). This argument is fallacious. It is customary to speak of an interest in something in order to distinguish between the interest—which denotes rights, privileges, powers, and immunities—and the physical object or other thing to which those attributes pertain. Thus, a person with racketeering profits or proceeds always has an interest in something, *i.e.*, currency, a bank account, or something else of value.

That Congress intended "interest" to encompass all traditional forms of property is illustrated by the congressional hearings, debates, and reports, in which the terms "interest" and "property" were repeatedly used synonymously.

2. Other portions of the RICO statute also show that forfeiture of racketeering profits and proceeds was intended. While Section 1963(a)(1) speaks broadly of "any interest * * * acquired or maintained in violation of section 1962," Section 1963(a)(2) reaches only "any interest *in* * * * *any enterprise* which [the defendant] has established operated, controlled, conducted, or participated in the conduct of,

in violation of section 1962" (emphasis added). If Congress had intended to restrict Section 1962(a)(1) to interests in an enterprise, it would presumably have done so expressly, as it did in Section 1963(a)(2). The use of different language in the two subsections indicates unmistakably that a different meaning was intended, especially since both subsections evolved from proposed legislation containing a single forfeiture provision limited to interests in an enterprise.

Our interpretation of Section 1963(a)(1) is also supported by the RICO statute's definition of the term "enterprise," which encompasses both legal entities and illegitimate associations-in-fact. It is rarely possible to identify an interest in an illegitimate enterprise, but persons associated with such organizations customarily receive illegal profits or proceeds. Thus, unless racketeering profits and proceeds are forfeitable, illegitimate enterprises will be effectively excluded from the reach of the RICO forfeiture provision—something that Congress can hardly have intended. Conversely, when a formal enterprise such as a corporation is enriched by racketeering activity, forfeiture of the owner's stock carries with it a forfeiture of the proceeds of the illicit activity; consequently, the forfeiture provision, even as narrowly construed by petitioner, will ordinarily entail some forfeiture of racketeering profits.

Petitioner's interpretation of the forfeiture provision is not supported by Section 1962(a), which makes it a separate crime "to use or invest" racketeering income to acquire an interest in, establish, or operate an interstate business. While certain relatively small purchases of securities are exempted from this provision, it does not follow, as the Ninth Circuit concluded in *Marubeni*, that Congress did not intend

to require the forfeiture of racketeering proceeds. It was completely consistent for Congress to require forfeiture of racketeering profits and proceeds while also providing that under certain circumstances the investment of such moneys is not a separate crime.

Nor is petitioner's argument supported by 21 U.S.C. 848(a)(2), a contemporaneously enacted provision requiring the forfeiture of "profits" derived from a continuing criminal enterprise engaged in drug-related activities. The broad term "interest" was undoubtedly employed in 18 U.S.C. 1963(a)(1) because of the RICO statute's wide intended scope, while the narrower term "profits" was used in 21 U.S.C. 848(a)(2) because the fruits of illegal drug activities are usually cash.

3. The legislative history of the RICO statute confirms that Congress intended to reach racketeering profits and proceeds. For example, Senator McClellan, the statute's chief sponsor, stated that the forfeiture provision was intended to take racketeers' "ill-gotten gains" (see, *e.g.*, 115 Cong. Rec. 9951 (1969); 116 Cong. Rec. 591-592 (1970)). Similarly, the House Report (H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 57 (1970) (hereinafter "House Report")) stated that the provision extends to "all property and interests, as broadly defined, which are related to the violations."

Although Congress certainly wanted to require forfeiture of racketeers' interests in businesses they had infiltrated, Congress's broader objective was to strike at the source of organized crime's wealth and hence its power. Congress recognized that organized crime thrives on its huge illegal income from activities such as drug distribution, gambling, and extortion. Without attacking the profits and proceeds flowing from such activities, Congress's goal of eradicating organ-

ized crime would be seriously undermined. In enacting the RICO statute, Congress sought to create new, potent remedies to achieve its objective and directed that the statute "be liberally construed to effectuate its remedial purposes" (84 Stat. 947). Construing Section 1963(a)(1) so as to prevent forfeiture of racketeering profits and proceeds would contravene this unequivocal directive and frustrate Congress's intent.

ARGUMENT

PROFITS AND PROCEEDS DERIVED FROM RACKETEERING ARE SUBJECT TO FORFEITURE UNDER 18 U.S.C. 1963(a)(1)

The sole issue in this case is whether profits and proceeds derived from racketeering constitute an "interest" within the meaning of 18 U.S.C. 1963(a)(1) and are thus subject to forfeiture. Here, the judgment of forfeiture required petitioner to disgorge some $340,000 that he obtained by submitting fraudulent insurance claims for property destroyed by a fire that he and other members of an arson ring had conspired to set. Petitioner contends (Br. 5-36) that Section 1963(a) reaches only "interests in an enterprise" and does not permit the forfeiture of "profits and proceeds." And, like the dissenters below (J.A. 106-107), petitioner premises his argument (Br. 5-6) upon the proposition that criminal forfeitures are disfavored and that forfeiture statutes must therefore be strictly construed.

Not only is that argument contrary to Congress's express directive that the RICO statute "be liberally construed to effectuate its remedial purpose" (84 Stat. 947, 18 U.S.C. 1961 note), but it ignores the fact that during the past 15 years Congress has come increasingly to view forfeitures as an essential weapon in

the battle against crime. During that period, Congress has enacted at least three other major statutes authorizing the forfeiture of money used in or derived from illegal activity. See 18 U.S.C. 1955(d) (illegal gambling businesses); 21 U.S.C. 848(a)(2) (continuing criminal enterprise); 21 U.S.C. 881(a) (controlled substances violations). And as petitioner himself points out (Br. 8-9), the states have emulated Congress's model. Thus, whatever the view once held of criminal forfeitures, there is no basis for arguing that the Congress that enacted Section 1963(a)(1) viewed criminal forfeitures with disfavor or intended the reach of that provision to be narrowly confined. In any event, petitioner's interpretation of Section 1963(a)(1) is inconsistent with the statutory language and Congress's expressed intent and would significantly hinder achievement of one of the principal aims of the RICO statute—destruction of organized crime's economic base.

A. The Plain Language of 18 U.S.C. 1963(a)(1) Requires the Forfeiture of "Any Interest" Derived From Racketeering and Thus Encompasses Racketeering Profits and Proceeds

"In determining the scope of a statute, [courts] look first to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (citation omitted). See also *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 7; *Rubin* v. *United States*, 449 U.S. 424, 429-431 & n.8 (1981); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). Here, 18 U.S.C. 1963(a)(1) requires the forfeiture of "any interest * * * acquired * * * in

violation of section 1962." There is no question that petitioner acquired the proceeds at issue in violation of Section 1962(c). Accordingly, if those proceeds constitute "any interest," they are forfeitable under Section 1963(a)(1).

1. The term "interest" is not defined by the RICO statute, undoubtedly because Congress intended that term to carry its usual meaning. See *Richards* v. *United States*, 369 U.S. 1, 9 (1962); *United States* v. *Snider*, 502 F.2d 645, 651 (4th Cir. 1974); *Hardy Salt Co.* v. *Southern Pacific Transportation Co.*, 501 F.2d 1156, 1168 (10th Cir. 1974); *Heli-Coil Co.* v. *Webster*, 352 F.2d 156, 157 (3d Cir. 1965). And, as the court below noted (J.A. 83), the ordinary meaning of the term "interest" encompasses the concept of profits or proceeds. *Webster's Third New International Dictionary* 1178 (1976) defines "interest" as, among other things, a "good," "benefit," or "profit." Similarly, *The Random House Dictionary of the English Language, Unabridged* (1979), defines interest to include "profit," "welfare," or "benefit." *Black's Law Dictionary* 729 (rev. 5th ed. 1979) (emphasis added) states that "interest" is "[*t*]*he most general term that can be employed* to denote a right, claim, title or legal share in something." In the *Restatement of Property* § 5 (1936) the word "interest" is said to denote any combination of "rights, privileges, powers and immunities" with regard to land or other things. See also 1 R. Powell, *The Law of Real Property* ¶ 96, at 367-368 (1977). Explaining its use of the term "interest," the *Restatement of Property* § 5 comment a (1936) observes that "[t]here is no corresponding term in common use" that has a similar scope. It then defines "real property" as any of several "interests in land" (*id.* § 8) and an "owner" as a "per-

son who has one or more interests" (*id.* § 10). Personal property has likewise been defined as "the right or *interest* which a person has in things personal" (emphasis added) (63 Am. Jur. 2d *Property* § 22, at 309 (1972)).

Also defining property as a collection of "interests," a leading treatise states (1 G. Thompson, *Commentaries on the Modern Real Property* § 5, at 25-27 (1980) (footnotes omitted; emphasis added)):

> Property is a term of broad significance, embracing * * * *every interest* or estate which the law regards of sufficient value for judicial recognition. The word may be properly used to signify *any valuable right or interest* protected by law. * * *
>
> * * * * *
>
> The term * * * extends to *every species of valuable right and interest*, including real and personal property, easements, franchises and other incorporeal heriditaments.

In sum, whatever else is denoted by the term "interest," it undoubtedly comprehends all forms of real and personal property, including profits and proceeds.

This Court has repeatedly relied upon the term "interest" in defining the meaning of "property" in the Due Process Clause. For example in *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972) (emphasis added), the Court wrote that "'*property interests*' * * * are not limited by a few rigid, technical forms. *Rather, 'property' denotes a broad range of interests* that are secured by 'existing rules or understandings.'" See also, *e.g.*, *Logan* v. *Zimmerman Brush*

Co., 455 U.S. 422, 430 (1982) (emphasis added), quoting *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("the types of *interests* protected as '*property*' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact' "); *Jago* v. *Van Curen*, 454 U.S. 14, 17-18 (1981); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 9 (1978); *Bishop* v. *Wood*, 426 U.S. 341, 344 & n.7 (1976); *Paul* v. *Davis*, 424 U.S. 693, 709 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134, 155 (1974) (emphasis added) ("The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of *interests* which it protects may not be required in dealing with another set of *interests.*"); *Board of Regents* v. *Roth*, 408 U.S. 564, 569, 571-572 (1972) (emphasis added; footnote omitted) ("The requirements of procedural due process apply only to the deprivation of *interests* encompassed by the Fourteenth Amendment's protection of liberty and property. * * * * * The Court has * * * made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.").

It was undoubtedly because Congress did not want the RICO forfeiture provision to be limited by "rigid, technical" (*Perry* v. *Sindermann*, *supra*, 408 U.S. at 601) definitions drawn from other areas of law that it selected the broad term "interest" to describe those things subject to forfeiture under Section 1963(a)(1). If, for example, Congress had employed the term "property"—the term used in several of the state racketeering statutes to which petitioner points (Br. 8-9)—the scope of Section 1963(a)(1) would

have been significantly reduced. Petitioner implicitly acknowledges this point because, while insisting that Section 1963(a)(1) is limited to interests in an enterprise, he acknowledges (Br. 10, 18-19) that such interests may include not only property in the narrow sense, but other sources of wealth and control, such as offices or positions.

Attempting to find "[t]he most general term that can be employed" (*Black's Law Dictionary* 729 (rev. 5th Ed. 1979)), Congress therefore selected the term "interest." This choice of language was fully consistent with the pattern of the RICO statute, which repeatedly seeks to achieve its far-reaching purposes by shunning terms with restricted legal meanings and instead utilizing broad new terms and concepts—such as the concept of an "enterprise" (18 U.S.C. 1961(4)); the very concept of "racketeering activity" (18 U.S.C. (Supp. V) 1961(1)), which is defined as embracing numerous predicate offenses; and the concept of "conduc[ting] or participat[ing] * * * in the conduct of such enterprise's affairs through a pattern of racketeering activity" (18 U.S.C. 1962(c)).

Because "[t]here is no corresponding term in common use" (*Restatement of Property* § 5 comment a at 9 (1936)), Congress's only alternative to the use of the term "interest" would have been a painstaking enumeration of the specific things subject to forfeiture. This is the approach taken in some of the bills recently introduced in Congress to reverse *Marubeni* and similar district court decisions (see S. 2320, 97th Cong., 2d Sess. § 101 (1982); Pet. Br. App. 12-13). When the RICO statute was enacted, however, Congress had no way of anticipating such decisions and, without the knowledge subsequently gained in RICO investigations and prosecutions,

Congress may have been hesitant to attempt to compile an exhaustive list of things subject to forfeiture. Wishing to strike broadly at the fruits of racketeering, Congress therefore selected the term "interest," the broadest term at its disposal.

2. Like the *Marubeni* court, petitioner has not attempted to define the term "interest."[4] Petitioner insists (Br. 9), however, that the term does not reach profits and proceeds because " '[i]nterest', by definition, includes of necessity an interest in something." Petitioner then asserts (*ibid.*) that the interests included within the scope of Section 1963(a)(1) must consequently be interests in an enterprise. This argument is plainly invalid. Every property interest, including the ownership of or right to receive profits or proceeds, may be described as an interest in something. Before the profits of an illegal enterprise are divided, each participant may be said to own an "interest" in the ill-gotten gain. After distribution, each participant will have a possessory or ownership interest in currency, valuables, a bank account, stocks, bonds, or the like. Thus profits and

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[4] Two district courts have stated that an

> "interest" is akin to a continuing proprietary right in the nature of a partnership or stock ownership (or holding a debt or claim, as distinguished from "equity" investment) rather than mere dividends or distributed profits.

United States v. *Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979); *United States* v. *Meyers*, 432 F. Supp. 456, 461 (W.D. Pa. 1977). No authority was given for this definition, and in light of the sources noted above we believe it is artificially narrow. Furthermore, even if it were one acceptable definition of an "interest," a court engaging in statutory interpretation need not adopt the narrowest possible meaning of a plain and ordinary word. *Turkette*, *supra*, 452 U.S. at 587 n.10; *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948). Rather, words should be given their "fair meaning in accord with the

proceeds do constitute an "interest in something."[5] If, however, petitioner means to suggest that an "interest" must denote something less than sole ownership, he is clearly wrong. For example, a sole proprietorship is clearly an "interest" in a business even though the sole proprietor owns the entire business. Similarly, a fee simple absolute not subject to any mortgage or lien could certainly be described as an "interest" in real estate. See *Restatement of Property* §§ 8, 14 (1936). And ownership of a car, furniture, or other personal belongings that have been fully paid for may accurately be described as a personal property "interest." In short, it is clear that profits or proceeds, whether in currency or some other form, fall squarely within the plain meaning of the term "interest."

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manifest intent of the lawmakers." *Id.* at 26. Here, the court of appeals' construction of the term "interest" is far more consistent with the usual meaning of that term and with Congress's clear intent.

[5] It is customary to speak of an interest *in* something in order to draw a distinction between the interest, which denotes "varying aggregates of rights, privileges, powers and immunities" (*Restatement of Property* § 5 (1936)), and the physical object or other thing to which those rights, privileges, powers, and immunities pertain. As one treatise puts it (1 G. Thompson, *supra*, § 5, at 29-30 (emphasis added)):

> [The term property] has a very wide significance and includes *every class of acquisition which one can own or have an interest* in. * * * The property, or subject matter of ownership, is to be thought of as one thing, and the *interest* or estate *therein*, as another. So, in another sense, the term is employed to indicate *the interest which can be acquired* in external objects or things.

Thus, a person with racketeering proceeds always has an interest in something, *i.e.*, rights, privileges, powers, or immunities with respect to cash, a bank account, or something else of value.

3. The accepted broad meaning of the term "interest" is fully consistent with the way that term was used in the congressional hearings, debates, and reports on the RICO statute. While members of Congress often spoke of forfeiting racketeers' interests in enterprises, the term "interest" was just as frequently used as a synonym for "property." Senator Hruska, a co-sponsor of Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 *et seq.*, the present RICO statute, repeatedly referred to Title IX's attack on the "property interests" of organized crime (*e.g.*, 116 Cong. Rec. 602 (1970)). Senator Byrd noted that "convictions alone * * * do not attack the vested property interests" of organized crime (*id.* at 607). Senator Dole similarly remarked that racketeering convictions by themselves are insufficient since they "do not reach the property interests of the enterprise" (*id* at 39296).

The House Report on the Organized Crime Control Act stated that "violations [of Section 1962] shall be punished by forfeiture to the United States of *all property and interests, as broadly described*, which are related to the violations." House Report, *supra*, at 57 (emphasis added). Congressman Poff, the chief sponsor of the House version of the RICO statute, stated that Title IX would allow criminal forfeiture of "the property interests involved in the violations" (116 Cong. Rec. 35295 (1970)). Representatives Conyers, Mikva, and Ryan, in their dissenting report, criticized the criminal forfeiture provision's "potential scope for deprivation of property" (see House Report, *supra*, at 188).

Witnesses before Congress likewise spoke of organized crime's "property" as the interest that would be subject to forfeiture. A report prepared by the

Association of the Bar of the City of New York explained that the statute required "forfeiture of property acquired or maintained in violation of the Section" (*Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 328 (1970) (hereinafter "*House Hearings*")). A statement submitted by the American Civil Liberties Union objected to Title IX because a convicted defendant could be "required to forfeit all property acquired through the prohibited activity" (*id.* at 499). See also 116 Cong. Rec. 854 (1970). The Committee on Federal Legislation of the New York County Lawyers' Association criticized the breadth of the criminal forfeiture provision, stating that upon conviction a racketeer's "assets" could be forfeited "insofar as they can be vaguely related to" the unlawful activity (*House Hearings*, *supra*, at 402). These statements confirm the view that the term "interest" was used to denote all property interests. What other things may be subject to forfeiture under Section 1963(a)(1) need not be decided here.

B. Forfeiture of Racketeering Profits and Proceeds Under Section 1963(a)(1) is Supported by Other Provisions of the RICO Statute and Is Entirely Consistent With Other Forfeiture Provisions

While devoting little attention to the language of 18 U.S.C. 1963(a)(1), petitioner and the lower courts that have accepted his construction of that provision have relied heavily upon other portions of the RICO statute and upon other forfeiture laws. In our view, however, the court of appeals' interpretation of Section 1963(a)(1) is supported by the overall structure of the RICO statute and is not in any way undermined by other forfeiture provisions.

1. Like the court below (J.A. 82), we believe that petitioner's contention that Section 1963(a)(1) is limited to interests in an enterprise is plainly refuted by the language of Section 1963(a)(2). While Section 1963(a)(1) speaks broadly of "any interest * * * acquired or maintained in violation of section 1962," Section 1963(a)(2) reaches only "any interest *in* * * * *any enterprise* which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of section 1962" (emphasis added). Similar language appears in Sections 1962(b) and 1964(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." J.A. 82, quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); see also *United States* v. *Wooten*, 688 F.2d 941, 950 (4th Cir. 1982); *Russell* v. *LEAA*, 637 F.2d 354, 356 (5th Cir. 1981). If Congress had intended to restrict subsection (a)(1) to interests in an enterprise, as petitioner argues, it presumably would have done so expressly, as it did in subsection (a)(2). See *United States* v. *Turkette*, *supra*; *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 8; *United States* v. *Naftalin*, 441 U.S. 768, 773-774 (1979).[*] Petitioner has not iden-

[*] In *Naftalin*, which concerned the construction of Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. 77q(a)(1), the respondent argued that employment of a device, scheme, or artifice to defraud in the offer or sale of securities was not unlawful unless the fraud operated "upon the purchaser" of the securities. This Court rejected that argument, stating (441 U.S. at 773-774): "The short answer is that Congress did not write the statute that way." By the same token, the short

tified any conceivable reason why Congress would have used different language in two subsections of the same provision if the same meaning was intended. The only possible explanation for such draftsmanship would be simple mistake—something that should not be lightly presumed.

The evolution of these provisions provides further evidence that Congress intended Section 1963(a)(1) to extend beyond interests in an enterprise. An early version of RICO, S. 1861, 91st Cong., 1st Sess. (1969), contained a single forfeiture provision that was limited to any "interests in the enterprise." Later, however, this provision was divided into two subsections, and the phrase "in the enterprise" was excluded from the first. Where Congress includes limiting language in an early version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended. See, *e.g.*, *Arizona* v. *California*, 373 U.S. 546, 580 (1963). Here, as the court of appeals concluded (J.A. 93), Congress's intent is clearly indicated by the fact that it "considered limiting all forfeitures under RICO to enterprise interests but, after extensive legislative work, ultimately opted to delete this across-the-board restriction." See also Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1981 N. Ill. U.L. Rev. 225, 238 & n.49.

Petitioner argues (Br. 17-18) that if the term " 'interest' were as all encompassing as suggested by the *en banc* decision below, 18 U.S.C. § 1963(a)(2) would have no meaning independent of 18 U.S.C. § 1963(a)(1)." This argument is plainly incorrect.

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answer to petitioner's contention that 18 U.S.C. 1963(a)(1) is limited to interests in an enterprise is that Congress did not so provide.

Section 1963(a)(1) reaches "any interest," whether or not in an enterprise, provided that the interest was "acquired or maintained in violation of section 1962." Section 1963(a)(2), on the other hand, is restricted to interests in an enterprise, but the interest itself need not have been illegally acquired or maintained. Instead, the enterprise must be one that the defendant "established operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." Thus, for example, racketeering profits and proceeds are subject to forfeiture under subsection (a)(1) but not under subsection (a)(2). And if a defendant lawfully acquired an interest in an enterprise and then conducted or participated in the conduct of the enterprise's affairs through a pattern of racketeering activity, his interest in the enterprise would be subject to forfeiture under subsection (a)(2) but not under (a)(1). There are undoubtedly factual situations to which both subsections of the forfeiture provision apply, but, as interpreted by the court below, they are clearly not redundant.[7]

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[7] Petitioner discusses several hypothetical cases (Br. 16-17, 23-28) in an effort to demonstrate that Section 1963(a)(1) extends only to interests in an enterprise. This discussion, however, is confused and demonstrates merely that petitioner does not understand the operation of the RICO statute.

In the first hypothetical (Pet. Br. 16-17) two persons have established and operate a "legitimate" enterprise, which is variously described as a "corporation" and a "partner[ship]." One of the principals conducts or participates in the affairs of the enterprise through a pattern of racketeering activity and thereby obtains $200,000 in illegal profits, twice as much as the business earns by legal means. The guilty principal then reinvests $150,000 of illegal profits in the business. Petitioner asserts that if the guilty principal were convicted of racketeering, "the corporation would be required to forfeit the

2. Our interpretation of 18 U.S.C. 1963(a)(1) is also supported by the RICO statute's definition of the

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$200,000 received" (*ibid.*). This, he claims (*id.* at 17), might "affect the stability of the company" and thereby frustrate Congress's intent to permit the survival of "legitimate businesses." Not only is this hypothetical implausible, but petitioner's argument is nonsense. A corporation would not be liable for a personal judgment of forfeiture against an individual. On the other hand, there is nothing startling about the proposition that a partnership is liable for a partner's business debts, and we see no reason why Congress would have wanted the partnership to keep the illegal profits or why Congress would have been concerned about preserving a business so dependent upon the fruits of illegal activity.

In the second hypothetical (Pet. Br. 23-25), an officer, an employee, and a stockholder of a legitimate pharmaceutical company sell the corporation's product illegally and "funnel[] part of their profit through" the corporate books (*id.* at 24). According to petitioner, these funds amount to "substantial income" for the company (*ibid.*). How or if the racketeers regain these funds petitioner does not explain. Petitioner attempts to identify the particular provisions of the RICO statute violated by each participant. We do not necessarily agree with this analysis, but in any event it appears irrelevant for present purposes. Petitioner asserts (Br. 25) that "forfeiture of proceeds would not be required, since such would not serve the purpose of RICO." Here, as in the prior hypothetical, petitioner's point appears to be that the legitimate business should not have to disgorge any reinvested racketeering proceeds. As we noted above, however, a non-defendant corporation would not be liable on judgments against individuals. On the other hand, we see no reason why the defendants' stock in the company or any claims they might have against the company should not be forfeitable.

In the third and fourth hypotheticals (Pet. Br. 25-28), illegitimate enterprises earn profits, some of which are used for purchases or investments on behalf of the enterprise and some of which are distributed to its members. Petitioner claims that the property of the enterprises would be forfeitable, while the distributed profits would not. Petitioner does

term "enterprise" (18 U.S.C. 1961(4)), which encompasses both legal entities and illegitimate associations-in-fact. *United States* v. *Turkette*, 452 U.S. 576 (1981). In the case of illegitimate associations-in-fact, forfeiture of interests in the enterprise is usually of little use, because such associations rarely have identifiable assets. Instead, any proceeds or profits received are usually distributed immediately to those associated with the enterprise. As a result, construing Section 1963(a)(1) to reach only interests in an enterprise would blunt the effectiveness of that provision in combatting illegitimate enterprises. Petitioner has not identified any reason why Congress might have wanted effectively to exempt such enterprises from RICO's forfeiture provision. Acceptance of his argument would mean that "[w]hole areas of organized criminal activity would be placed beyond the * * * reach of" that important provision (*Turkette, supra*, 452 U.S. at 589). "In view of the purposes and goals of the Act, as well as the language of the statute," it seems unlikely "that Congress nevertheless confined the reach of [the forfeiture provision] to only narrow aspects of organized crime, and, in particular * * * *only* the infiltration of legitimate business" (*id.* at 590).[8]

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not explain why Congress would have wanted to insulate distributed profits from forfeiture. In any event, it is rare for a wholly illegal enterprise to make investments or purchases in its own name.

[8] Apparently recognizing the unlikelihood that Congress intended effectively to exempt illegitimate enterprises from RICO's forfeiture provisions, petitioner suggests (Br. 21-22, 25-28) that there are identifiable interests in illegitimate enterprises that may be forfeited. These interests, he claims, are "undistributed profits" (*id.* at 26) and "assets * * * purchased

3. In *Marubeni*, the court's decision that racketeering income is not subject to forfeiture under Section 1963(a)(1) was based in large measure upon 18 U.S.C. 1962(a), which makes it a separate crime "to use or invest" racketeering income or proceeds "in acquisition of any interest in, or the establishment or operation of" any interstate enterprise. Section 1962(a) contains an exception, however, for certain purchases of securities on the open market where the purchaser does not intend to control the issuing company and the securities in that company owned by the

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or contributed by the individual members in furtherance of the enterprise" (*id.* at 28). Illegitimate enterprises, however, are unlikely to have much in the way of undistributed profits; and identification of assets contributed to the illegitimate association will usually be quite difficult. In any event, that limited forfeiture would not be sufficient to serve RICO's broad remedial goals.

Taking another tack, petitioner (Br. 20-21) and the dissenters below (J.A. 108) argue that the Department of Justice itself has recognized that " 'there is often nothing to forfeit • • • in the case of individuals associated in fact" (J.A. 108, quoting Taylor, *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 117 Am. Crim. L. Rev. 379, 391 (1980)), quoting Criminal Division, U.S. Dep't of Justice, *Racketeer Influenced and Corrupt Organizations Statute* 55 (4th ed. 1980)). The publication from which this quotation was taken is a handbook prepared some time after the RICO statute was enacted by the staff of one of the Organized Crime and Racketeering strike forces for use by Department of Justice attorneys. It therefore hardly constitutes a definitive interpretation of the statute's meaning. Furthermore, the statement does not necessarily mean that racketeering proceeds are not subject to forfeiture. Even if forfeiture of racketeering proceeds is permitted, it will nevertheless be true that there will often be nothing to forfeit in the case of illegitimate enterprises because in many instances no proceeds can be located. Alternatively, the statement may have been meant simply as a synopsis of the then-prevailing case law.

purchaser, his family, and his racketeering accomplices total less than 1% of the company's shares and do not confer the power to elect any member of the board of directors. Based upon this provision, the *Marubeni* court reasoned (611 F.2d at 767): "Congress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used."

Both petitioner and the dissenters below have eschewed this argument, and in our view it is plainly flawed. Simply because under certain circumstances the investment of racketeering income is not a separate crime, it does not follow that Congress intended to exempt all such income from forfeiture. By the *Marubeni* court's reasoning, no illegally obtained interest should be subject to forfeiture unless the subsequent investment of that interest constitutes a separate crime. Obviously there is no such rule. For example, under 21 U.S.C. 881(a)(6), reinvested profits derived from an illegal drug transaction are expressly made subject to forfeiture, yet no provision of law makes it a separate crime to invest those funds.[9]

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[9] Without explanation, the dissent below suggested (J.A. 103) that Section 1963(a)(1) is the applicable forfeiture provision when Section 1962(a) or (b) is violated and that Section 1963(a)(2) is the applicable forfeiture provision when Section 1962(c) is violated. And since Section 1962(a) and (b) concern illegal conduct relating to interests in an enterprise, the dissent concluded that Section 1963(a)(1) authorizes the forfeiture of only such interests. Petitioner has chosen not to advance this argument, and it is obviously untenable.

First, Congress expressly provided that both Section 1963(a)(1) and (2) apply to violations of "section 1962."

4. Petitioner places heavy emphasis (Br. 6-7) on 21 U.S.C. 848(a)(2), which was enacted as part of the Controlled Substances Act, 21 U.S.C. (& Supp. V) 801 *et seq.*, and, as noted, authorizes the forfeiture of "profits" obtained in a continuing criminal enterprise engaged in certain drug offenses (see 21 U.S.C. 848(b)). In like manner, the Ninth Circuit relied upon 21 U.S.C. 848(a)(2) in concluding that "[h]ad Congress intended forfeiture of racketeering income, * * * it would have expressly so provided" (*Marubeni, supra*, 611 F.2d at 766 n.7). As the court below concluded (J.A. 97-98), however, inclu-

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Had Congress intended to limit Section 1963(a)(1) and (2) to particular subsections of Section 1962, it would presumably have done so expressly. Second, other language contained in the forfeiture provision clearly indicates that no such limitation was intended. To be sure, Section 1963(a)(1) applies to interests that have been illegally "acquired or maintained," while Section 1962(b) makes it illegal to "acquire or maintain" an interest in an enterprise by certain means and Section 1962(a) outlaws certain "acquisition[s]" of such interests. Similarly, Section 1963(a)(2) applies to interests that the defendant has illegally "conducted * * * or participated in the conduct of," while Section 1962(c) makes it illegal "to conduct or participate * * * in the conduct of [an] enterprise's activity or collection of unlawful debt." However, the dissenters' neat theory soon breaks down. Section 1963(a)(2) also speaks of interests in enterprises that the defendant has illegally "established operated, or controlled," and that language plainly applies to violations of Section 1962(a) and (b). Section 1962(a) makes it a crime to use racketeering income in "the establishment or operation of" an interstate enterprise, and Section 1962(b) makes it illegal to acquire or maintain "control of" such an enterprise by certain illegal means. Thus, since Section 1963(a)(2) unmistakeably applies to violations of all subsections of 1962, there is no basis for concluding that Section 1963(a)(1) is restricted to violations of Section 1962(a) and (b).

sion in the Controlled Substances Act of a forfeiture provision specifically mentioning "profits" cannot be regarded as substantial evidence that the broader language of 18 U.S.C. 1963(a)(1) was not meant to reach profits, as well as other types of property interests. Because of the enormous volume of legislation considered by Congress and the diverse sources responsible for drafting bills, language in one statute often sheds little light upon the meaning of language in a separate statute, even when they were enacted contemporaneously. Nevertheless, if Congress had employed the same term in both forfeiture provisions, there would be some basis for arguing that a single, consistent meaning was intended. Here, however, petitioner suggests that because a more specific term—"profits"—was used in 21 U.S.C. 848(a)(2)(A), the more general term "interest" employed in 18 U.S.C. 1963(a)(1) must not have been intended to reach profits. We would doubt the soundness of this reasoning even if the two provisions derived from the same piece of legislation. Unless Congress has some reason to believe that a broad general term does not encompass a narrow, more specific term, the use of specific language in one provision cannot fairly be read as imposing limitations upon broader, more general language in another provision.

Furthermore, in the present case, it is readily apparent why Congress utilized different language in the two provisions. The RICO statute was broadly aimed at organized crime's economic power in all its forms, including cash assets and profits, ownership interests in legitimate and illegitimate enterprises, all types of contraband, stolen property, illegally obtained contract rights, and offices and positions of influence. Thus, the broad term "interest" was used in

18 U.S.C. 1963(a)(1) in order to encompass all these forms of real and personal property and other sources of illegal wealth and control. By contrast, the narcotics activity proscribed by 21 U.S.C. 848 almost invariably generates monetary profits, and therefore the narrower term "profits" was employed in 21 U.S.C. 848(a)(2).

Petitioner certainly is correct in suggesting that members of Congress who voted for the RICO statute were aware of the Controlled Substances Act. At least one congressman noted that the narcotics forfeiture provision bore a "close relationship" to the pending RICO statute (116 Cong. Rec. 33651 (1970) (remarks of Rep. Brotzman)), and others viewed the two Acts as essential, linked components of an attack on organized crime's far-flung criminal activities, including those in the realm of drugs (see, *e.g.*, 116 Cong. Rec. 1180-1182 (1970) (remarks of Sen. Thurmond); *id.* at 33631 (remarks of Rep. Weicker); *id.* at 33646 (remarks of Rep. Kastenmeier); *id.* at 35318 (remarks of Rep. Anderson)). Therefore, if members of Congress compared the two provisions closely, as petitioner's argument supposes, it seems quite unlikely that without explanation a potent forfeiture weapon was withheld from the RICO statute, which was intended for use in a broad assault on organized crime, while that same weapon was included in the Controlled Substances Act, which was meant for use in one part of the same struggle. Like illegal drug transactions, many of the predicate acts of racketeering, such as gambling, arson, and extortion (see 18 U.S.C. (Supp. V) 1961(1)), almost invariably generate large cash proceeds. Indeed, the same drug offenses may provide the basis for conviction under RICO (see 18 U.S.C. (Supp. V) 1961(1))

("'racketeering activity' means * * * dealing in narcotic or other dangerous drugs") and 21 U.S.C. 848. Thus, if Congress had considered the question and felt that forfeiture of profits was appropriate in one case but not the other, one would expect it to have so indicated, but no such distinction was drawn. Accordingly, "Congress'['s] use of 'profits' in 21 U.S.C. § 848(a)(2)(A) cannot support the negative inference * * * as to the meaning of 'interest' in 18 U.S.C. § 1963(a)(1)" (J.A. 98).

5. Petitioner also suggests (Br. 29-33) that subsequent proposed legislation demonstrates that the 1970 RICO forfeiture statute excludes profits. This conclusion is wholly unjustified. The bills in question were introduced to rectify *Marubeni* and similar district court cases. Their introduction hardly suggests that their sponsors viewed those decisions as correct interpretations of 18 U.S.C. 1963(a)(1) as it currently stands.[10] See *United States* v. *Gordon*, 638

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[10] For example, in urging passage of the bill introduced as S. 2320, 97th Cong., 2d Sess. (1982), the Justice Department wrote prior to the court of appeals' en banc decision in this case (Letter from Robert A. McConnell, Assistant Attorney General for Office of Legislative Affairs, U.S. Dep't of Justice to the Speaker, House of Representatives (Mar. 9, 1982) (attachment entitled: "Section by Section Analysis: Proposed 'Comprehensive Criminal Forfeiture Act of 1984,'" at 6-7)):

> It has been the government's position that an "interest * * * acquired or maintained in violation of section 1962" as described in 18 U.S.C. 1963(a)(1) includes the profits or proceeds of the racketeering activities proscribed by the RICO statute. However, the courts that have directly addressed this issue to date have not agreed with this position, but have instead interpreted the term "interest" to mean a continuing, proprietary interest *in an enterprise*. * * * The result of such decisions is that the profits generated by racketeering activity generally are not subject to forfeiture under RICO unless reinvested in the

F.2d 886, 888 n.5 (5th Cir. 1981). And, in any event, it is settled that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Jefferson County Pharmaceutical Association* v. *Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), slip op. 15 n.27, quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960). See also *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968).

For the same reasons, petitioner's argument draws no support from the fact that certain state racketeer-

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enterprise or used to acquire or control another enterprise.

The inability to reach directly the profits generated by racketeering has severely restricted the effectiveness of the RICO forfeiture provisions. Illegitimate enterprises encompassed by the RICO statute rarely have any significant forfeitable assets other than the profits generated by illegal activities. In addition, when legitimate businesses come under the control of racketeers, their assets are commonly bled until the company goes bankrupt, leaving little in the way of a forfeitable interest in the company within the prevailing restrictive court interpretations of 18 U.S.C. 1963(a)(1).

The purported purpose of the RICO forfeiture provisions is to separate racketeers from their sources of economic power. But without the authority to reach the ill-gotten profits of racketeering, this goal cannot be realized. * * *

The government's inability to reach the gain produced through racketeering, such as the insurance proceeds in the [present] case, has seriously limited the intended utility of the RICO forfeiture sanction. To cure this problem section 1963(a), as amended by section 101 of the bill, specifically provides in the description of property subject to criminal forfeiture, which is set out in paragraph (2), for the forfeiture of racketeering proceeds.

ing laws provide expressly for the forfeiture of "profits," "money," or "all property, real or personal," acquired from racketeering (see Pet. Br. 8-9). With one exception, all of the state provisions upon which petitioner relies postdate federal court decisions barring the forfeiture of racketeering profits under the federal law. See *United States* v. *Meyers*, 432 F. Supp. 456 (W.D. Pa. 1977); *United States* v. *Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979).[11] Undoubtedly aware of the problems created by such decisions, the legislatures of these states presumably employed language different from that in 18 U.S.C. 1963(a)(1) in order to avoid similar interpretations of their new racketeering laws. While these state statutes are not evidence of Congress's intent in enacting Section 1963(a)(1), they do illustrate that a legislative body interested in attacking organized crime's economic base will provide for the forfeiture of racketeering profits.[12]

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[11] See Colo. Rev. Stat. § 18-17-106 (1981) (enacted 1981); 1982 Conn. Pub. Acts No. 82-343 (enacted 1982); Fla. Stat. Ann. § 895.05(2)(a) (West Cum. Supp. 1983) (relevant language added by 1981 Fla. Laws ch. 81-141, § 2); Ga. Code Ann. § 26-3405 (Cum. Supp. 1981) (enacted 1980); Ind. Code Ann. § 34-04-30.5.3 (Burns Cum. Supp. 1982) (enacted 1980); R.I. Gen. Laws § 7-15-3 (Cum. Supp. 1980) (enacted 1979). The sole exception, Hawaii Rev. Stat. § 842-3 (1976), which was enacted in 1972, requires the forfeiture of "any interest or property [the defendant] has acquired or maintained in violation of [the racketeering law]" and provides for the seizure of "*all property or other interest* declared forfeited" (emphasis added). This language illustrates that the legislature regarded "property" as falling within the meaning of the broad term "interest."

[12] Petitioner suggests (Br. 28-29) that criminal forfeiture of racketeering profits and proceeds is unnecessary because the victims of racketeering may recover such sums through civil actions (18 U.S.C. 1964(c)). However, if Congress had

C. The Legislative History of the RICO Statute Shows that Congress Intended to Require the Forfeiture of Racketeering Profits and Proceeds

The legislative history of the RICO statute provides confirmation for the conclusion that 18 U.S.C. 1963(a)(1) authorizes the forfeiture of racketeering profits and proceeds (see J.A. 87-95). Petitioner's claim (Br. 11-21) that the legislative history demonstrates a more limited congressional intent is wholly without merit.

1. The legislative history makes clear that the RICO statute was intended to provide new weapons of unprecedented character for an assault upon organized crime and its economic roots. In the Statement of Findings prefatory to the Organized Crime Control Act of 1970, Congress described the problem of organized crime in dramatic terms (84 Stat. 922-923, 18 U.S.C. 1961 note):

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread

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felt that civil suits alone were sufficient to strike at organized crime's economic base, it would not have enacted the criminal forfeiture provision. Civil suits by themselves are not enough because, among other things, racketeering profits and proceeds often cannot be traced to particular victims. Thus, if racketeering profits and proceeds are not subject to criminal forfeiture, organized crime's enormous income from crimes such as gambling and illegal drug activities (see 18 U.S.C. (Supp. V) 1961(1)) may go untouched.

Moreover, criminal forfeiture under 18 U.S.C. 1963 should not interfere with recovery by victims of racketeering, because in disposing of forfeited interests the Attorney General is directed to "mak[e] due provision for the rights of innocent persons." Customs procedures incorporated by reference in 18 U.S.C. 1963(c) permit such persons to file claims for and to receive forfeited property (see 19 U.S.C. (Supp. V) 1608, 1613).

> activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Congress declared that "[i]t is the purpose of this Act to seek the eradication of organized crime * * * *by providing enhanced sanctions and new remedies* to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923 (emphasis added). See *Turkette, supra*, 452 U.S. at 588-589. Having set forth the basis for and purpose of this extraordinary legislation, Congress directed in the preamble of Title

IX that the statute "be liberally construed to effectuate its remedial purpose" (Section 904(a), 84 Stat. 947, 18 U.S.C. 1961 note),[13] which, as noted, was the eradication of organized crime.[14]

Congress stressed the need to fashion new remedies in order to achieve its far-reaching objectives (S. Rep. No. 91-617, 91st Cong., 1st Sess. 76 (1969) (hereinafter "Senate Report")). As the Senate Report stated: "What is needed here * * * are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts" (*id.* at 79). Incorporating the conclusions of the Antitrust Section of the American Bar Association, Congress further stated its intent that " 'all legitimate methods of combating organized crime must be utilized' " (*id.* at 76; citation omitted). Senator

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[13] RICO is the only substantive federal criminal statute that contains such a directive. A similar provision appears in the Criminal Appeals Act, 18 U.S.C. 3731.

[14] Several courts of appeals have acknowledged and followed Congress's directive to construe the RICO statute liberally. See *United States* v. *Godoy*, 678 F.2d 84, 86-87 (9th Cir. 1982), petition for cert. pending, No. 82-538; *United States* v. *Grzywacz*, 603 F.2d 682, 686 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980); *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Forsythe*, 560 F.2d 1127, 1135-1136 (3d Cir. 1977); *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States* v. *Campanale*, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

Scott remarked that "new legal weapons are needed in the crime fighters' arsenal" (116 Cong. Rec. 819 (1970)), and Senator McClellan stressed the urgent need for new penal remedies to divest "ill-gotten gains" amassed by "criminals where they enter or operate an organization through a pattern of racketeering activity" (*id.* at 591-592). Representative Poff, the floor manager of the bill in the House, made similar observations (*id.* at 35193),[15] and Representative Rodino exhorted that "[d]rastic methods * * * are essential, and [Congress] must develop law enforcement measures at least as efficient as those of organized crime" (*id.* at 35199).[16]

The RICO statute was viewed as one such "extraordinary" weapon to "strik[e] a mortal blow against the property interests of organized crime" "by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods" (116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska)). The criminal forfeiture provision was included to serve all of the aims of the RICO statute: to "punish, deter, incapacitate, and * * * directly to remove [organized crime's] corrupting influence from the channels of commerce" (*id.* at 18955 (remarks of Sen. McClellan)).

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[15] Because of their roles in achieving passage of the RICO statute, the remarks of Senators McClellan and Hruska, the sponsors of the Senate bill, and Representative Poff, the House floor manager, are entitled to additional weight. *Lewis* v. *United States*, *supra*, 445 U.S. at 63.

[16] Senator Hruska also spoke of the need for prosecutors to "use every legal means at their command to combat this evil menace" (115 Cong. Rec. 5886 (1969)), the aim of which was the "amassing of huge profits" (116 Cong. Rec. 601 (1970)).

2. The legislative history also leaves no doubt that, in Congress's view, the economic power of organized crime derived from its huge illegal profits.[17] In light of this fact, Congress could not have hoped to mount a successful attack upon organized crime's economic roots without reaching racketeering profits.

In his Message on Organized Crime, President Nixon noted that organized crime's "economic base is principally derived from its virtual monopoly of illegal gambling, the numbers racket, * * * the importation of narcotics," and certain other crimes (Senate Report, *supra*, at 35). Similarly, the Senate Report incorporated the American Bar Association's conclusion that " 'organized crime * * * takes billions of dollars—mostly in cash and mostly untaxed—annually from the American public * * *. The magnitude of the problem makes it clear that all legitimate methods of combating organized crime must be utilized' " (*id.* at 76; citation omitted).

During the congressional debates, the sources and magnitude of organized crime's income were repeatedly emphasized. Organized crime's income from gambling, identified as its major revenue source, was estimated at between $20 billion and $50 billion per year, and of that sum more than $7 billion was estimated to be profit. In its next most profitable activity, the illegal distribution of narcotics, organized crime was estimated to reap annual profits of $350

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[17] See Blakey, *The RICO Civil Fraud Action In Context: Reflections on* Bennett *v.* Berg, 58 Notre Dame L. Rev. 237, 249-256 (1982), for a history of congressional investigations and hearings into organized crime and Congress's long-standing concerns about racketeers' wealth and influence. See also Task Force on Organized Crime, The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* (1967).

million. About the same sum was estimated to flow annually into organized crime's coffers from loan sharking.[18] Lesser profits were thought to derive from prostitution, extortion, protection and shakedown activities, illegal forgeries, credit card frauds, and miscellaneous crimes.[19] In short, organized crime was said to " 'operate[] vast illegal enterprises that produce an annual income of many billions of dollars.' " 116 Cong. Rec. 586, 18913 (1970) (remarks of Sen. McClellan) (citation omitted); *id.* at 819 (remarks of Sen. Scott); *id.* at 35305 (remarks of Rep. Hogan); *id.* at 35309 (remarks of Rep. Minshall); *id.* at 35310 (remarks of Rep. Flowers); *id.* at 35320 (remarks of Rep. Stratton). As several congressmen noted, organized crime's annual illicit income of approximately $60 billion was as large as the combined income of AT&T, Standard Oil of New Jersey, General Motors, General Electric, Ford, IBM, RCA, and Chrysler. *Id.* at 35312 (remarks of Rep. Brock); *id.* at 35320 (remarks of Rep. Price).[20]

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[18] See 115 Cong. Rec. 5873, 5884-5885 (1969); 116 Cong. Rec. 590, 592 (1970) (remarks of Sen. McClellan); *id.* at 601 (remarks of Sen. Hruska); *id.* at 603-604 (remarks of Sen. Allott); *id.* at 606, 607 (remarks of Sen. Byrd); *id.* at 831 (remarks of Sen. Harris); *id.* at 962 (remarks of Sen. Murphy); *id.* at 970 (remarks of Sen. Bible); *id.* at 35199 (remarks of Rep. St. Germain); *id.* at 35201 (remarks of Rep. Poff); *id.* at 35216 (remarks of Rep. McDade); *id.* at 35305 of Rep. Hogan); *id.* at 35319 (remarks of Rep. Anderson).

[19] See, *e.g.*, 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan); *id.* at 601 (remarks of Sen. Hruska); *id.* at 606 (remarks of Sen. Byrd); *id.* at 970 (remarks of Sen. Bible).

[20] An August 1969 *Time Magazine* cover story, introduced into the record by Senator McClellan, estimated the annual receipts of La Cosa Nostra at " 'well over $30 billion,' " of which at least $7 billion to $10 billion were thought to constitute profit (116 Cong. Rec. 595 (1970); citation omitted).

In view of Congress's deep concern about organized crime's enormous illegal income and Congress's expressed desire to forge new means to combat organized crime's power, the intent to authorize forfeiture of racketeering profits seems obvious. The House Report, *supra*, at 57, stated that the forfeiture provision extended "to all property and interests, as broadly defined, which are related to the violations." Representative Poff stated: "After conviction, the ill-gotten gains must be forfeited to the Government. This sanction is not only poetic justice but a strong deterrent as well" (115 Cong. Rec. 9951 (1969)). President Nixon, endorsing the concept of "new weapons and tools * * * to enable the Federal government to strike * * * at the * * * *sources of revenue* that feed the coffers of organized crime," stated that forfeiture was among the arsenal of new weapons designed to "*attack the property of organized crime*" (*Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 448-449 (1969) (emphasis added) (hereinafter "*Senate Hearings*") Attorney General Mitchell explained that "the arrest and conviction of Cosa Nostra leaders will not in and of itself destory organized crime unless *the sources of revenue* are demolished. * * * [A]s long as *the flow of money* continues * * * and *the principal sources* [*organized crime's*] *revenue*" remain untouched, organized crime will not be eradicated (*id.* at 112; emphasis added). The United States Chamber of Commerce urged Congress to pass legislation broadly and comprehensively aimed at eliminating " 'organized crime's economic power base' " (116 Cong. Rec. 600 (1970); citation omitted). In Senator McClellan's view, RICO's penalties, including forfeiture, were intended not only "to punish, deter, [and] incapacitate," but also to remove organ-

ized crime "from the channels of commerce" (116 Cong. Rec. 18955 (1970)).[21]

3. It is true that Congress viewed the RICO statute in large measure as a response to organized crime's infiltration of legitimate enterprises. *Turkette*, *supra*, 452 U.S. at 591. Accordingly, Congress anticipated that one of RICO's chief results would be the forfeiture of ownership or controlling interests in infiltrated businesses. See, *e.g.*, 116 Cong. Rec. 603 (1970) ("[T]he bill is designed to root out the influence of organized crime in legitimate business, into which billions of dollars of illegally obtained money is channelled * * *. [A] unique forfeiture provision will make it possible to divest the racketeer of any interest he may have obtained in the organization or business." (remarks of Sen. Yarborough, quoted at Pet. Br. 13-14)). But Congress's concerns were not limited to the problem of organized crime's infiltration of legitimate businesses. As previously noted, Congress's broader goal was to remove the profit from organized crime by separating the racketeer from his ill-gotten gains.

Moreover, Congress recognized that organized crime's objective in infiltrating legitimate businesses often was not to obtain a valuable, long-term interest in the enterprise but to secure a quick profit by "bleeding" the company's assets and leaving it bank-

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[21] Petitioner's claim (Br. 15-16) that the *sole* purpose of forfeiture was removal of organized crime from the legitimate enterprises that it infiltrated and corrupted is thus incorrect. Although that was an important objective of the RICO statute, it was not the only one. Indeed, when Senator McClellan introduced S. 1861, a predecessor bill, he explained that it was intended to "remove the illegal profit potential" as well as to "effectively remove the organized crime element from a particular field of activity" (115 Cong. Rec. 9567 (1969)).

rupt.[22] Frequently this was accomplished by the very activity involved in this case—burning down a business and collecting fire insurance proceeds. Senate Report, *supra*, at 77; 115 Cong. Rec. 5874 (1969) (remarks of Sen. McClellan). Obviously, forfeiture of interests in an enterprise would do little to deter such activity. Indeed, authorizing forfeiture of interests in an enterprise but not racketeering profits and proceeds would only encourage the speedy looting of infiltrated companies.

Congress's urgent concern about preventing these practices is unmistakable. On several occasions, Senator McClellan noted that "approximately 200 syndicate-inspired bankruptcy schemes are perpetrated annually, each involving up to 250 or more creditors and upwards of $200,000 in merchandise or material." See, *e.g.*, 116 Cong. Rec. 18940 (1970). See also 115 Cong. Rec. 5874 (1969); 116 Cong. Rec. 592 (1970). He stated (*id.* at 591): "In business, the mob bleeds a firm of assets, then takes bankruptcy. It steals securities and then uses the stolen securities to fraudulently obtain funds from lending institutions." The Senate Report also described the effect of organized crime takeovers of legitimate businesses: "After takeover, defaulted loans [to organized crime loansharks] are often liquidated by professional arsonists burning the business and then collecting the insurance or by various bankruptcy fraud tech-

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[22] Senator Hruska entered into the record an account of the Murray Packing Company, a Bronx meat processing plant that was forced into bankruptcy after an organized crime figure became president. This individual bought large quantities of supplies on credit, ran up debts of approximately $1.3 million, made quick sales at cut-rate prices, and appropriated about $750,000 of company funds for his personal use (115 Cong. Rec. 23569 (1969)).

niques * * *" (Senate Report, *supra*, at 77). This analysis was repeated by a witness testifying in favor of the legislation on behalf of the Chamber of Commerce (*Senate Hearings*, *supra*, at 417 (remarks of Donald F. Taylor). As one expert summarized the problem: "[O]rganized crime and organized criminals will go into any business area where they can make a fast buck" (*id.* at 180 (statement of Paul J. Curran, Chairman, New York State Commission of Investigation)).

Congress took note of other means by which organized crime extracted immediate profits at the expense of infiltrated enterprises. The Senate Report quoted FBI Director Hoover's testimony about pending cases involving thefts of securities from brokerage houses by known organized crime figures (Senate Report, *supra*, at 77). Attorney General Mitchell cited examples of organized crime's theft of Treasury bonds, securities, stock warrants, and money from established financial institutions (116 Cong. Rec. 5768 (1970)). Organized crime was repeatedly linked to credit-card frauds, cargo theft, hijacking, and fencing operations (*id.* at 970 (remarks of Sen. Bible)) and to the infiltration of labor unions and the manipulation of and theft from welfare and pension funds (115 Cong. Rec. 5874 (1969) (remarks of Sen. McClellan)). See also Senate Report, *supra*, at 78. As several congressmen observed, infiltrated enterprises were sometimes destroyed by racketeers for tax reasons. See, *e.g.*, 115 Cong. Rec. 23569 (1969) (remarks of Sen. Hruska); 116 Cong. Rec. 953 (1970) (remarks of Sen. Thurmond) ("[O]ne of the favorite devices of organized crime is to infiltrate a company, build it up, and then let it go broke so that it can take

advantage of certain tax provisions and other devices thus disposing of or protecting a large treasury of illegally obtained dollars.").

Because of the danger that an infiltrated business would be quickly stripped of its assets, the forfeiture provision was designed "to remove the illegal profit potential" as well as to "effectively remove the organized crime element from a particular field of activity" (115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan, introducing a predecessor bill, S. 1861)). In light of Congress's expressed concern about the bleeding of legitimate businesses, we think it quite unlikely that Congress intended to enact a forfeiture provision that provided an incentive for such activity while authorizing forfeiture of worthless interests in a bankrupt shell. Cf. *Turkette, supra*, 452 U.S. at 589 ("Considering * * * the Act's broad purposes, the construction of RICO suggested by [petitioner] * * * is unacceptable. Whole areas of criminal activity would be placed beyond the substantive reach of the enactment.").

Petitioner's interpretation of 18 U.S.C. 1963(a)(1) is equally inconsistent with another pressing concern expressed by Congress, *i.e.*, organized crime's use of its profits to escape punishment. In its Statement of Findings, Congress spoke of organized crime's use of money "obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation * * * to subvert and corrupt our democratic processes * * *" (84 Stat. 922-923, 18 U.S.C. 1961 note). By corruption of the democratic processes, Congress meant widespread payoffs to police, prosecutors, judges, juries, and legislators, which

were thought to total approximately $2 billion each year. See, *e.g.*, 116 Cong. Rec. 591, 596 (1970) (remarks of Sen. McClellan); *id.* at 601 (remarks of Sen. Hruska); *id.* at 607 (remarks of Sen. Byrd); *id.* at 953 (remarks of Sen. Thurmond); *id.* at 962 (remarks of Sen. Murphy); *id.* at 35200 (remarks of Rep. St. Germain); *id.* at 35307 (remarks of Rep. Scheuer); *id.* at 35309 (remarks of Rep. Mizell); *id.* at 35311 (remarks of Reps. Fountain and Broomfield); *id.* 35328 (remarks of Rep. Meskill). See also *id.* at 595, 596 (excerpts from *Time* Magazine's cover story on organized crime, see page 39 note 20, *supra*). Exempting racketeering profits from forfeiture would permit this corruption to continue and thereby appreciably hinder the enforcement of every provision of the RICO statute.

4. As evidence that Congress did not intend to reach racketeering profits, petitioner points (Br. 14-15) to a 1969 letter from then Deputy Attorney General Kleindienst to Senator McClellan. In that letter, Mr. Kleindienst, speaking for the Department of Justice, stated concerning an earlier version of Section 1963(a)(1) (*Senate Hearings*, *supra*, at 407 (emphasis added)):

> It is felt that this revival of the concept of forfeiture as a criminal penalty, *limited as it is in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here*, and not extending to any other property of the convicted offender, is a matter of Congressional wisdom rather than of constitutional power.[23]

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[23] The courts have upheld the constitutionality of RICO's in personam forfeiture approach. See *United States* v. *Grande*, 620 F.2d 1026, 1039 (4th Cir.), cert. denied, 449 U.S. 919

The court below correctly concluded that this letter did not indicate a congressional intent to preclude forfeiture of racketeering profits. The sentence at issue did not refer to Section 1963(a) as finally enacted but to an earlier version in which forfeiture was expressly limited to interests in an enterprise. Thus, by stating that forfeiture under Section 1963(a) was "limited * * * to one's interest in the enterprise," the letter was merely following the language of the bill then pending. Moreover, the purpose of this sentence was not to explain what the statutory provision meant but to explain why the Department of Justice believed it was constitutional. Critics of the provision stated that it was akin to the ancient practice, long forbidden in this country, whereby all the property of a convicted felon was forfeited to the state.[24] See, *e.g.*, 116 Cong. Rec. 35205 (1970) (remarks of Rep. Mikva). Such laws contrasted with the numerous statutes of undoubted constitutionality authorizing the forfeiture of money received or property used in the commission of crime (see, *e.g.*, 18 U.S.C. 3612 (bribe money); 18 U.S.C. 3615 (vehicles and vessels used for illegal transportation of alcohol)). See J.A. 106-107.

The crux of the constitutional objection to the RICO forfeiture provision appears to have been that it could result in the loss of property interests not derived from or customarily used in criminal activity. As

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(1980); *United States* v. *Huber*, *supra*, 603 F.2d at 397; *United States* v. *Thevis*, *supra*, 474 F. Supp. at 141.

[24] See U.S. Const. Art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); Act of Apr. 30, 1790, ch. 9, 1 Stat. 117, § 24 (codified at 18 U.S.C. 3563) ("[N]o conviction or judgment * * * shall work corruption of blood, or any forfeiture of estate.").

Representative Mikva put it (116 Cong. Rec. 35205 (1970); emphasis added):

> Under this bill, if you are engaged in two acts of gambling * * * and you are engaged in an interstate business or any business that affects interstate commerce * * * *they take your business away* * * *.

Responding to this objection, Mr. Kleindienst wrote that the RICO forfeiture provision was constitutional because it did not require the defendant to forfeit all interests in any enterprise but was "limited * * * to [the] interest in the enterprise which is the subject of the specific offense" for which he was convicted (*Senate Hearings*, *supra*, at 407). Thus, not only is it unreasonable to interpret the Kleindienst letter as an explanation of what the final version of Section 1963(a)(1) means, it is equally unreasonable to interpret that letter to mean that constitutional problems would arise if Congress provided for the forfeiture of interests other than interests in an enterprise. On the contrary, since racketeering profits derive directly from illegal activity, forfeiture of such interests is not subject to the same objection as forfeiture of an interest in a legitimate business.

Acknowledging that the Kleindienst letter related to a differently worded statute, petitioner nonetheless argues (Br. 15) that its inclusion in the Senate Report on the final forfeiture provision "indicates Congress's understanding and intent in passing the [existing] RICO forfeiture provisions." As the court below observed, however, the reprinting of the letter in the final report is of no significance for present purposes. "[N]othing in the report suggests that the letter provides a technical commentary on the scope of each section of the expanded bill" (J.A. 94). The

portion of the letter upon which petitioner relies remained relevant despite the amendment of the forfeiture provision because it discussed the constitutionality of requiring the forfeiture of interests in an enterprise, a feature that was of course retained in the bill's final version (*ibid.*; *House Hearings*, *supra*, at 171).

D. The Rule of Lenity Is Not Applicable in This Case

Petitioner contends (Br. 6) that the rule of lenity requires that 18 U.S.C. 1963(a)(1) be construed narrowly to reach only interests in an enterprise and not profits and proceeds derived from racketeering. "Although this principle of construction applies to sentencing as well as substantive provisions" (*United States* v. *Batchelder*, 442 U.S. 114, 121 (1979)), it has no application in the present case.

Under the rule of lenity, ambiguously worded criminal statutes must be "strictly construed" if the legislative history does not reveal Congress's intent. A nonconstitutional rule of statutory interpretation (*Rewis* v. *United States*, 401 U.S. 808, 811 n.5 (1971)), the rule of lenity " 'serves as an aid for resolving an ambiguity; it is not used to beget one * * *. The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Turkette*, *supra*, 452 U.S. at 587-588 n.10, quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).

Here, as we have demonstrated, the language of the RICO forfeiture provision is clear. The literal language of Section 1963(a)(1) requires forfeiture of "any interest [the convicted racketeer] has acquired or maintained in violation of section 1962." It does not limit forfeitures to interests in an enterprise.

Similarly, the legislative history unmistakably evidences Congress's intent to strike at organized crime's economic base by divesting convicted racketeers of their ill-gotten gain. And as we have showed above, while Congress was also interested in removing racketeers from controlling positions in infiltrated businesses, that was certainly not its sole interest, as petitioner seems to suggest. Thus, since the meaning of Section 1963(a)(1) is not ambiguous, the application of a rule of lenity would be inappropriate here.

Finally, application of "this rule of narrow construction" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) would be inconsistent with Congress's direction that the RICO statute "be liberally construed to effectuate its remedial purpose" (84 Stat. 947, 18 U.S.C. 1961 note). RICO's broad "remedial purpose" is "the eradication of organized crime * * * by providing enhanced sanctions and new remedies * * *" (84 Stat. 923). Applying the rule of lenity and thereby preventing the forfeiture of racketeering profits would contravene this unequivocal congressional directive.[26]

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[26] We note, moreover, that petitioner unquestionably had "fair warning * * * as to what conduct is * * * punishable by deprivation of liberty or property" (*Huddleston* v. *United States*, *supra*, 415 U.S. at 831). Petitioner's racketeering conviction has been sustained on appeal, and petitioner certainly may not assert that he relied upon a belief that he was entitled to keep the fruits of his illegal activity. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." That provision plainly confers upon the defrauded insurance company the right to recover the amounts paid to petitioner on the fraudulent insurance claims. Furthermore, even without

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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that statute, petitioner could not have reasonably expected to keep the fraudulently obtained insurance proceeds if his crime was exposed and established. See *Restatement of Restitution* § 1 (1937); cf. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946).

APPENDIX

18 U.S.C. 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged

in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1963 provides:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

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No. 82-472-CFY
Status: GRANTED

Title: Joseph C. Russello, Petitioner
v.
United States

Docketed:
September 9, 1982

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Dion, Ronald A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 9 1982	G	Petition for writ of certiorari filed.
3	Oct 22 1982		Order extending time to file response to petition until November 19, 1982.
4	Nov 22 1982		Order further extending time to file response to petition until December 10, 1982.
5	Dec 15 1982		DISTRIBUTED. January 7, 1983
6	Dec 29 1982	X	Brief of respondent United States in support of petition filed.
7	Jan 10 1983		Petition GRANTED.
			**********
8	Feb 23 1983		Joint appendix filed.
9	Feb 23 1983		Brief of petitioner Joseph C. Russello filed.
11	Mar 24 1983		Order extending time to file brief of respondent on the merits until April 23, 1983.
12	Mar 31 1983		Record filed.
13	Mar 31 1983		Certified original record & C.A. proceedings, 4 boxes received.
14	Apr 25 1983		Order further extending time to file brief of respondent on the merits until May 6, 1983.
15	May 6 1983		Brief of respondent United States filed.
16	Jul 8 1983		CIRCULATED.
17	Aug 15 1983		SET FOR ARGUMENT. Wednesday, October 5, 1983. (2nd case)
18	Oct 5 1983		ARGUED.